

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
EYA DEVELOPMENT, LLC (HOYT PROPERTY)**

Applicant

Bob Youngentob

William Landfair

Charles Irish

Chris Kabatt

Aakash Thakker

For the Application

Robert R. Harris, Esquire

Cindy Bar, Esquire

Attorneys for the Applicant

Ann McDonald, on behalf of CCCFH – the Citizens

Coordinating Committee for Friendship Heights

Peter Salinger, on behalf of CCCFH

Conditionally in Support of the Rezoning¹

Norman Knopf, Esquire

Attorney for CCCFH

Dan Dozier, on behalf of the Little Falls Watershed

Alliance (LFWA)

In Support of the Rezoning

Jenny Sue Dunner, on behalf of the Coalition for

the Capital Crescent Trail (CCCT)

Took No Position on Rezoning

Jim Humphrey, on behalf of the Montgomery

County Civic Federation (MCCF)

Robert Dyer

Opposed to the Rezoning

Before: Martin L. Grossman, Hearing Examiner

Zoning Application No. G-907

HEARING EXAMINER’S REPORT AND RECOMMENDATION

¹ CCCFH had been opposed to granting an easement across public land, which is necessary for access to the proposed development, but that having been agreed to by the Maryland-National Capital Park and Planning Commission, the group now conditionally supports the proposed rezoning. Their only remaining reservation is the quantity of on-site parking.

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I. EXECUTIVE SUMMARY

Applicant:	EYA Development, LLC
LMA No. & Date of Filing:	G-907, filed April 6, 2011
Zoning and Use Sought:	RT-15; Use: 30 Townhomes (25 market-rate units & 5 MPDUs)
Current Zone and Use:	Current Zone: I-1; Current Use: BETCO cinder block distribution
Location:	5400 Butler Road, Bethesda, Maryland, between Little Falls Parkway and the Capital Crescent Trail, southwest of River Road.
Applicable Master Plan:	<i>1982 Westbard Sector Plan</i>
Acreage to be Rezoned:	1.8121 acres (78,935 sq. ft.)
Density Permitted in RT-15 Zone:	18.3 dwelling units/acre per Code §59-C-1.74(b), with MPDUs
Density Planned:	16.6 dwelling units per acre (<i>i.e.</i> , 30 Dwelling Units on 1.8121 acres)
Bldg. Coverage Allowed/Planned:	No Maximum for RT-15, per §59-C-1.74(c) / 31%, approximately
Green Space Required/Planned:	30% Minimum per §59-C-1.74(d)(1) / 30% minimum per the SDP
Parking Spaces Required/Planned:	60 required (2 spaces per unit for 30 units) per Code §59-E-3.7 63 planned (2 per market rate unit; 5 for MPDUs; 8 visitor spots) plus potentially 49 additional driveway spaces (39 are compact)
Building Height Limits:	35 feet maximum allowed / 35 feet maximum planned
Environmental Issues:	The site is not in a special protection area, but it abuts parkland, and will require an easement over parkland for access to the townhouses. A portion of the site is in a stream valley buffer. There is no forest on site, and the site is currently almost entirely impervious. It is also a “brownfield” with contaminated soil.
Consistency with Master Plan:	The project does not directly comply with the RT-10 recommendation of the Sector Plan, but both Technical Staff and the Planning Board noted that the Sector Plan recommends townhouse development on the site, and the RT-15 Zone would also result in five MPDUs. Moreover, the proposed rezoning would accomplish other goals of the Master Plan, including improved stormwater management on the site, reducing excessive noise levels and minimizing impervious areas. On the other hand, MCCF notes that the Master Plan also encourages retention of industrial uses in the County.
Neighborhood Response:	CCCCFH had been opposed to granting an easement across public land which will provide access to the proposed development, but that having been agreed to by the M-NCPPC, the group now conditionally supports the proposed rezoning. Their only remaining reservation is the quantity of parking proposed. MCCF opposes the rezoning because it feels that the Master Plan calls for retention of industrial uses in the County, and that the proposed project would not meet all RT Zone standards. The Little Falls Watershed Alliance supports the rezoning. Only one nearby resident testified in opposition, and that individual actually lives outside the defined surrounding area. CCCT took no position, but favors access to the Capital Crescent Trail.
Technical Staff Recommends:	Approval
Planning Board Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Local Map Amendment (LMA) Application No. G-907 was filed on April 6, 2011, by Applicant EYA Development, LLC. It requests reclassification of 1.8121 acres (78,935 square feet) of land located at 5400 Butler Road, Bethesda, Maryland, from the existing I-1 Zone to the RT-15 Zone. The property, which consists of Parcel 513 on Tax Map HM 13, is situated between Little Falls Parkway and the Capital Crescent Trail, southwest of River Road. The land is owned by Peter B. Hoyt (tax account number 07-00421993), who contracted to sell the land to Applicant. Exhibit 4.

The application was filed under the Optional Method authorized by Zoning Ordinance §59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development that consists of thirty new townhomes, including twenty-five market-rate units and five moderately priced dwelling units (MPDUs). The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 69, which contains an illustrative diagram and a specification of the binding elements (three in the initial filing, but ultimately thirteen), as well as other information regarding the development.

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) reviewed the plans, and in a report dated July 1, 2011, recommended approval (Exhibit 30). The Montgomery County Planning Board considered the revised application on July 14, 2011, and unanimously voted to recommend approval, as set forth in a memorandum dated July 20, 2011 (Exhibit 38). The Planning Board agreed with its Technical Staff that the application satisfied all of the criteria for reclassification to the RT-15 Zone. In doing so, the Planning Board also supported six new binding elements (for a total of nine at the time) that addressed concerns raised by members of the community. The Board noted that parking sufficiency would be addressed at site plan review.

A letter in opposition to the proposed development was submitted by the Montgomery County Civic Federation (MCCF). Exhibit 34(a). MCCF asserts that the proposal is inconsistent with the

Sector Plan, incompatible with the surrounding area and not in conformance with the requested RT-15 Zone. The Citizens Coordinating Committee on Friendship Heights (CCCFH) also filed a letter expressing its concerns about the proposed rezoning, but noted that it was in discussions with the developer in an effort to resolve them. Exhibit 37(a).

A public hearing was duly noticed and convened on July 25, 2011, at which time the Applicant presented testimony from five witnesses in support of the application. Applicant also introduced a copy of its Easement Agreement with the Maryland-National Capital Park and Planning Commission (Exhibit 43(a)), allowing it access to Little Falls Parkway across parkland, and specified additional binding elements for its schematic development plan, negotiated with the community, bringing the total of proposed binding elements to thirteen.

Jim Humphrey testified on behalf of the Montgomery County Civic Federation (MCCF), which opposed the rezoning because it feels that the applicable Sector Plan calls for retention of industrial uses in the County. The only other opposition came from Robert Dyer, a citizen who lives about a half a mile away from the site, outside the defined surrounding area. He opposed the proposal because of the easement over parkland and because he feels that the proposed development will be incompatible with nearby industrial and commercial sites.

The proposed development was supported by the testimony of Dan Dozier, on behalf of the Little Falls Watershed Alliance (LFWA), because eliminating the current industrial use will greatly improve water quality and reduce noise in the area. The proposed rezoning was conditionally supported by testimony from two witnesses on behalf of the Citizens Coordinating Committee on Friendship Heights (CCCFH). CCCFH had been opposed to the granting of an easement across public land to provide access to the proposed development, but that having been approved by the M-NCPPC, the group now supports the rezoning if issues relating to the quantity of parking can be resolved.²

² Two witnesses testified for CCCFH, Ann McDonald, an officer of the organization and Peter Salinger, a member. Their

Jenny Sue Dunner testified on behalf of the Coalition for the Capital Crescent Trail (CCCT). Although her organization takes no position on rezoning applications, she noted that the proposal includes a connection with the Capital Crescent Trail which will result in fewer cars on the roads.

After the hearing was completed, the record was held open for filing, by the Applicant, of the executed covenants and the revised plans, including the agreed-to additional binding elements, and for responses thereto by Technical Staff and interested parties. The Applicant timely filed the proposed covenants and the revised plans on August 1, 2011 (Exhibits 60 - 62), and submitted them for review by Technical Staff. They were thereafter revised, following comments from the community (Exhibit 63) and Technical Staff (Exhibits 68(a) and (c)). The final SDP (Exhibit 69) was filed on August 11, 2011. The executed covenants (dated August 3, 2011) were filed on August 9, 2011. Exhibit 66(a). The record closed, as scheduled, on August 11, 2011.

After a careful review of the entire record, the Hearing Examiner finds that Applicant's proposal meets the standards for reclassification of the subject site to the RT-15 Zone; that the planned development will be compatible with the community; and that rezoning will be in the public interest. While the rezoning will result in the loss of an industrial use in the County, the benefits of the rezoning to nearby parkland and to water quality far outweigh the loss.

III. FINDINGS OF FACT

A. Subject Property

The subject property (5400 Butler Road, Bethesda, Maryland, identified as Parcel 513 on Tax Map HM 13), has an area of about 78,935 square feet (1.8121 acres). It is located about 1200 feet south of River Road, just outside the Westbard commercial area and in proximity to the Friendship Heights Central Business District and residential areas. The site is bordered on the north by Euro

testimony differed as to the impact of the parking issues. Ms. McDonald stated that even if the parking issue could not be resolved at this stage, CCCFH would support the rezoning (Tr. 150-152), while Mr. Salinger, supported by CCCFH's attorney, testified that CCCFH's support was premised upon EYA resolving the parking concerns. Tr. 291-293.

[illegible]

Technical Staff describes the subject site as follows (Exhibit 30, pp. 3-4):

The 1.81-acre site is generally rectangular in shape. The property has an approximate 50 percent increase in slope from east to west, with the sharp grade differential of around 20 feet occurring largely at the western property line where the site adjoins the Capital Crescent Trail (i.e., the trail is elevated above the site). . . . The subject property is currently zoned I-1 and is developed with the BETCO plant, which manufactures and distributes cinder blocks. BETCO has been at this location for a number of years, but has recently expressed an intention to relocate. The existing plant consists of multiple buildings and is largely comprised of impervious surfaces. The impervious surfaces encroach into the adjacent parkland in many areas.

Pictures of the site as it presently exists, from Applicant's PowerPoint Presentation (Exhibit 41(g)) and from the Staff report (Exhibit 30, p. 4), are shown below:



Currently, the only vehicular access to the site is from a private extension of Butler Road, to the north. Tr. 218. The site is not in a special protection area, but it abuts parkland, and M-NCPPC agreed to an easement over that parkland so that the proposed townhouse residents will be able to access Little Falls Parkway.³ Exhibits 42-44. A portion of the site is in a stream valley buffer, but there is no forest on site, nor any specimen trees. The site is currently almost entirely impervious, and its soil contains some contaminants, as will be discussed in Part III. I. of this report.

B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the project.

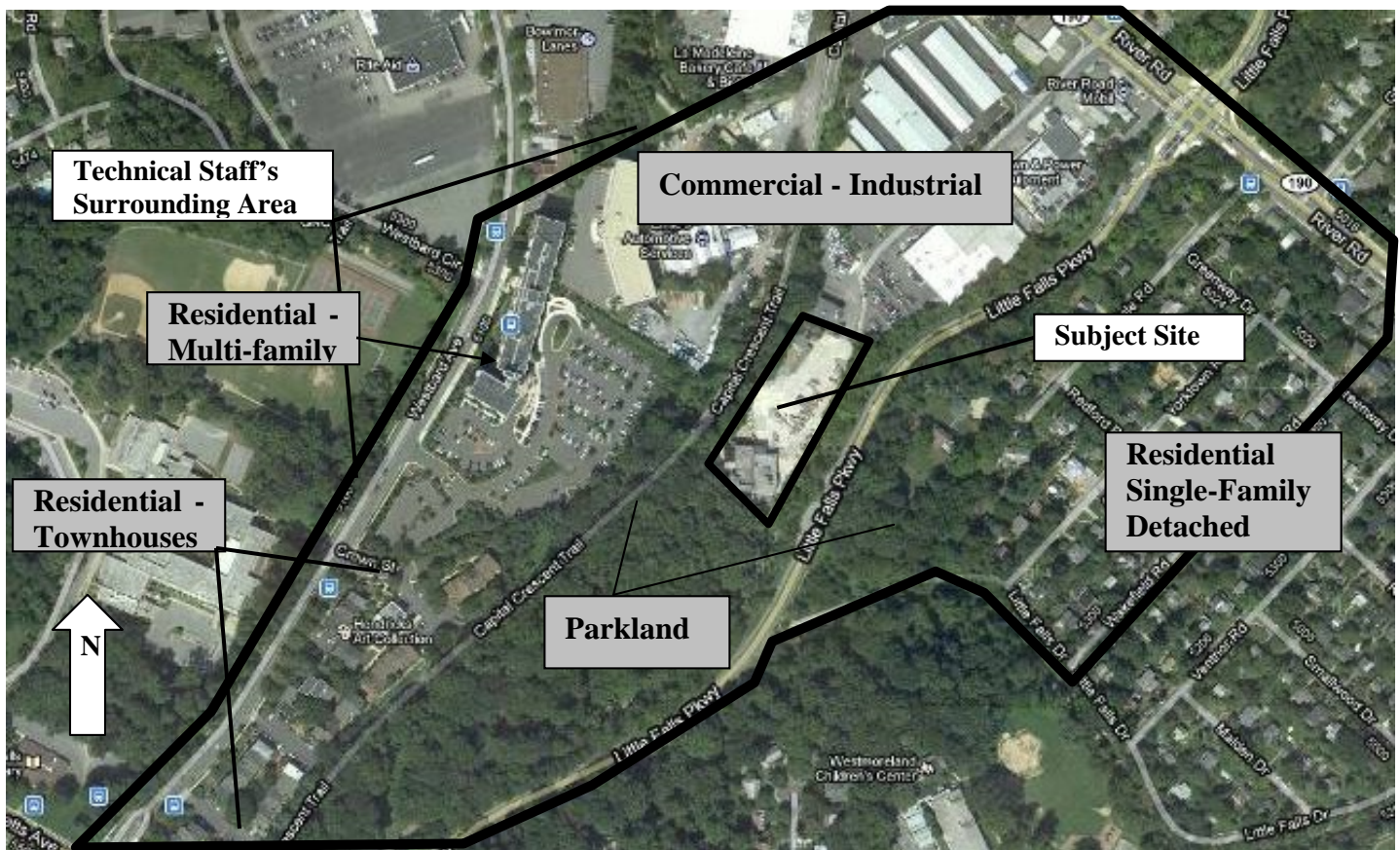
Technical Staff proposed to define the surrounding area as bordered by River Road to the north, the residential homes on the east side of Little Falls Parkway to the east, parkland down to Massachusetts Avenue on the south, and Westbard Avenue to the west. Exhibit 30, p. 5. It is depicted on the aerial photo map from page 5 of the Technical Staff report, reproduced on the next page.

Applicant’s land planner, Bill Landfair, proposed to define the surrounding area with slightly different boundaries, as shown by a yellow line on Exhibit 40 (not reproduced here). Mr. Landfair’s defined area extends somewhat further to the north than Technical Staff’s, including more of the mixed commercial/residential area between Westbard Avenue and River Road.⁴

³ The process for obtaining the Easement Agreement was rather involved. First, it had to be conceptually approved by the Montgomery County Planning Board, which occurred after a public hearing on January 20, 2011 (Exhibit 43). Then the full M-NCPPC had to approve the easement, which occurred on February 16, 2011 (Exhibit 42). On June 16, 2011, after a public hearing, the Planning Board approved the draft Easement Agreement (Exhibit 43). Next, the federal National Capital Planning Commission had to give its approval, which occurred on July 7, 2011 (Exhibit 44). Finally, an Easement Agreement must be executed. Although the final version of the Easement Agreement has been filed (Exhibit 43(a)), it cannot be executed unless and until the rezoning is approved because it requires Applicant to make a substantial payment to M-NCPPC upon execution. Tr. 154-155.

⁴ Although Exhibit 40 labels the extended area as “commercial,” it includes a large apartment building (Westbard

Mr. Landfair indicated that these differences were not that significant and that he could accept either definition. Tr. 236. The Hearing Examiner agrees that the definitional differences at the northern extreme of the surrounding area should have little impact because both definitions include substantial commercial and residential areas around the subject site. Thus, the Hearing Examiner accepts Technical Staff's definition of the surrounding area, as depicted below (Exhibit 30, p. 5):



Technical Staff describes the surrounding area as follows (Exhibit 30, p. 5):

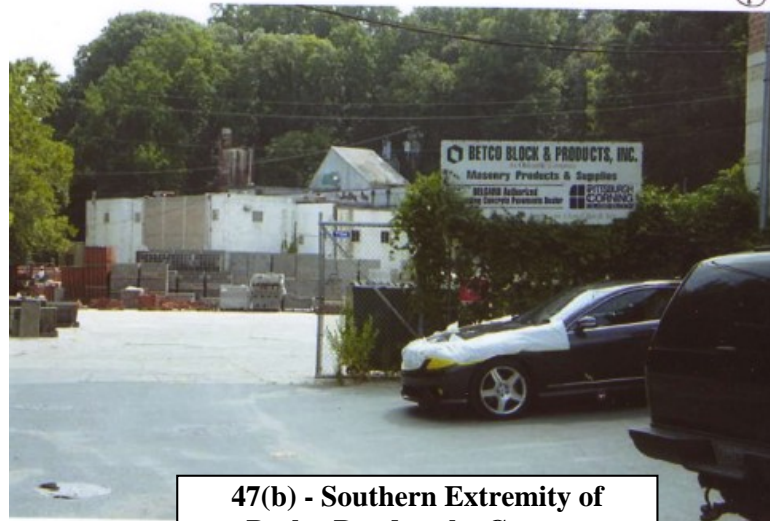
The land use and zoning pattern of the surrounding area is diverse. The Westbard commercial area is to the west of the site. Here, land uses are mixed, with higher density residential buildings and commercial shopping venues in place under C-0 zoning. Many industrial uses under the I-1 Zone line Butler Road to the north of the site. Parkland immediately surrounds the remaining three sides of the site, all within the R-60 Zone. An existing townhouse community, zoned R-T 12.5, is located further south of the site. One-family residential homes are further east, also in the R-60 Zone.

Towers Apartments at 5401 Westbard Avenue) in addition to the commercial enterprises. The defined area accepted by the Hearing Examiner, as shown above, also includes an apartment building (Park Bethesda at 5325 Westbard Avenue).

During the hearing (Tr. 140-141), the Citizens Coordinating Committee on Friendship Heights supplied some ground level photos of the surrounding area (Exhibits 47(a), (b), (e) and (h)):



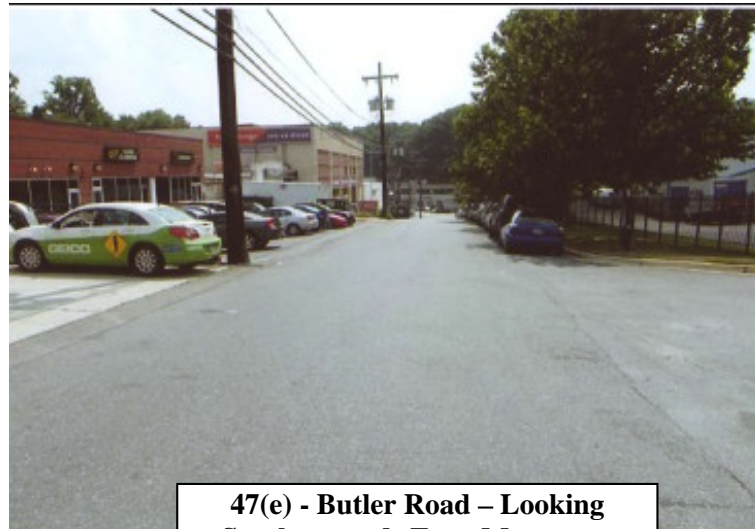
47(h) - Little Falls Parkway – Looking South at the Approximate Area of the Proposed Access to the Development



47(b) - Southern Extremity of Butler Road at the Current Entrance to the Subject Site



47(a) - River Road – Looking East towards its Intersection with Little Falls Parkway



47(e) - Butler Road – Looking South towards Euro Motorcars and the Subject Site

William Landfair, Applicant's land planner, aptly described the character of the surrounding area as "quite diverse." Tr. 236. As Mr. Landfair explained (Tr. 237):

... looking further to the west, across the Capital Crescent Trail, where you have the Westbard commercial area, you have quite a few different types of land uses, a mixture of retail, office, and residential uses in the C-1, C-0, I-1 and R-10 zones.

To the north, of course, along Butler Road, you have a mixture of industrial and commercial uses in the I-1 zone. To the east and to the south you have park land, and of course, further to the east you have the single family homes in the R-60 zone.

And further to the southwest, again across the Capital Crescent Trail, you have townhouses in the RT-12.5 zone.

It is quite clear from both Technical Staff's description of the area and Mr. Landfair's description that the surrounding area is composed of a mixture of residential (multi-family, townhouse and single-family-detached), parkland, commercial and industrial uses.

C. Zoning History

The zoning history of the subject site was provided by Technical Staff (Exhibit 67):

In 1958, when the County was comprehensively rezoned, the subject property was placed in the I-2 Zone. On October 19, 1982, following the recommendations of the 1982 Westbard Sector Plan, the subject property was rezoned from I-2 to I-1 through the G-368 sectional map amendment. The subject property is currently zoned I-1. . . .

D. Proposed Development

The Applicant proposes to remove the existing industrial use (BETCO cinder block plant) and construct 30, three-story townhouses, consisting of 25 market-rate units and five moderately priced dwelling units (MPDUs). Applicant's vision for the project was discussed by its president, Bob Youngentob, who testified that EYA considers itself a smart growth developer which tries to place its developments in areas that benefit from existing infrastructure, where people have amenities that they can walk to, and therefore can place less reliance on their cars. Tr. 72.

Mr. Youngentob views the BETCO cinder block plant currently on the site as "something that really didn't fit in the overall concept of this setting of the park." Tr. 76. He considered the recommendation of the 1982 Westbard Sector Plan for townhouse development of this site, but felt that without access to Little Falls Parkway, the site was really not appropriate for residential development.

Applicant's proposal therefore calls for the primary access to the proposed townhouses to be off of Little Falls Parkway, and because Little Falls has a prohibition against commercial vehicles, there would be a secondary access off of Butler Road for commercial vehicles, trash pickup, delivery services, and the like. Tr. 76-78. Applicant's concept of the development is well demonstrated on the site layout portion of the rendered schematic development plan (Exhibit 70):



Mr. Youngentob noted that many “baby boomers” are looking for alternative lifestyles to the typical single family home. They want situations where they have lower maintenance, shorter commutes and access to recreational as well as retail amenities. He feels that the proposed development will result in “quality of life improvements” for County residents. Tr. 73-74. The proposed location is close to the retail available in the Westbard area and even closer to the Capital Crescent Trail, which residents will be able to access by bicycle and foot via a public access easement to be constructed by the Applicant.

Each of the 25 market-rate townhomes will have a two-car garage, and the five MPDUs will each have a one-car garage. Two of the MPDUs will have an additional dedicated parking space on site, and at least eight additional surface parking spaces will be located on the property. Issues about the adequacy of the proposed parking will be discussed in the next section of this report.

E. Schematic Development Plan and Binding Elements

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan (SDP) that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding on the SDP must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The Applicant’s final SDP (Exhibit 69), which was revised after the hearing and approved by Technical Staff (Exhibits 68(a) and (c)), sets forth the thirteen binding elements and one non-binding element, for the development as follows:

BINDING ELEMENTS

1. Density will be limited to no more than 30 townhouses, of which no more than 5 will be MPDU's.
2. Green space will be a minimum of 30% of the gross tract area.

3. Building height will be limited to 35 feet.
4. The impervious area of the site will be reduced significantly from the current condition with the final reduction determined at Site Plan.
5. Market rate units will provide garage parking spaces for at least 2 cars, moderately priced dwelling units will provide garage parking spaces for at least 1 car, and at least 2 of the MPDU units will also have a dedicated second parking space. A minimum of eight (8) additional non-driveway parking spaces will be provided on the site.
6. Subject to approval of the Maryland National Capital Park and Planning Commission ("M-NCPPC"), Applicant will install "no parking" signs along that portion of Little Falls Parkway that confronts the site. Applicant also will include in its HOA documents a confirmation that parking is prohibited on and along Little Falls Parkway.
7. Prior to Site Plan approval for the project, Applicant shall execute, and thereafter comply with all terms and conditions of the easement agreement with M-NCPPC, (the "Easement Agreement"), set forth as Exhibit 43A in the record of Case No. G-907, approved by vote of the M-NCPPC on June 16, 2011.
8. Access to the site will be provided via an easement and bridge connection to Little Falls Parkway pursuant to the Easement Agreement with M-NCPPC (the "Easement"), limited to passenger vehicles, bicycles and pedestrians traveling to and from the townhouse dwelling units, and for pedestrians and bicycles traveling to or from the Capital Crescent Trail. Vehicular use of the Easement is not permitted by trucks or vehicles prohibited from using Little Falls Parkway by Commission Rules or Regulations. The Easement will not be open to vehicular use until one or more townhouse units on the site are available for sale.
9. Truck ingress to and egress from the site will be solely via a connection to Butler Road, with such connection having a traffic control mechanism(s) restricting through traffic from Butler Road to Little Falls Parkway and Little Falls Parkway to Butler Road, so as to prevent cut-through traffic by any vehicle use not associated with the development.
10. Development of the site will include a public access easement, to be constructed by the Applicant and maintained by the Applicant or the successor Homeowners Association for the site, to enable pedestrians and bicyclists to traverse the site for access from Little Falls Parkway to and from the Capital Crescent Trail ("CCT"). Such easement will be a minimum of 5 feet in width through the development site. Development will include, subject to M-NCPPC approval, construction of a connection to the CCT designed to accommodate bicycles and pedestrians in a manner similar to the pedestrian/bicycle connection between the CCT and Bradley Boulevard in Bethesda.
11. Development of the site will include, at the Applicant's cost, removal of the paving and debris materials from the existing industrial use on the site along Little Falls Branch, on the land of M-NCPPC, that is currently paved or otherwise encroached upon, and the replanting of this area with trees/shrubs, which will assist in screening the site from Little Falls Parkway, as approved by M-NCPPC.

12. The Applicant's consideration for the Easement to Little Falls Parkway will be governed by the Easement Agreement between the Applicant and M-NCPPC to implement certain public amenity projects to enhance the surrounding community and parkland which may include but are not limited to, stream restoration, non-native species management, trail renovations/maintenance and/or traffic calming measures as prescribed in the Easement Agreement between the Applicant and M-NCPPC.

13. Consistent with the Easement Agreement with M-NCPPC, in addition to the CCT public access easement, the development also will include a green landscape easement, granted to M-NCPPC, as an aesthetic green space that can be viewed by users of the park and trail. Such easement areas shall be at least equal in gross area to the gross area of the Easement granted by M-NCPPC for access to Little Falls Parkway. To the extent feasible and practical, at the sole discretion of the Applicant, the easement shall be concentrated in the area along the southern property line, adjacent to Little Falls Parkway.

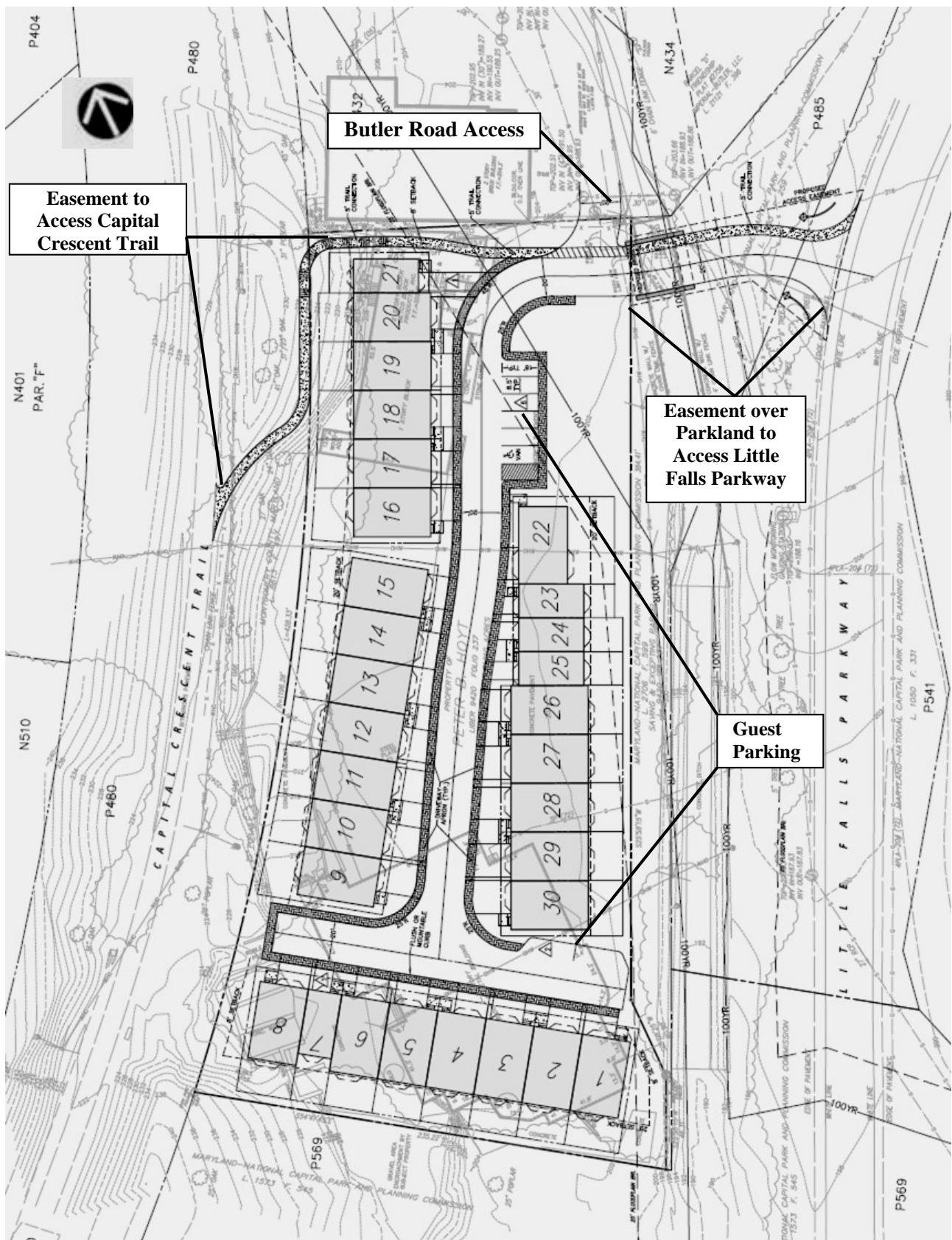
NON-BINDING ELEMENT

Applicant will cooperate with the Capital Crescent Trail Coalition and other civic organizations to urge the appropriate governmental agencies to use the money required to be paid by Applicant pursuant to PAMR and some portion of funds Applicant is paying as consideration for the Easement Agreement for constructing improvements to the Capital Crescent Trail in the vicinity of River Road to facilitate and promote bicycling.

Applicant has also filed an executed copy of the Declaration of Covenants in the record of this case as Exhibit 66(a), and it contains the specified binding elements, as required. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

The graphic portion (*i.e.*, site layout) of the revised SDP (Exhibit 69), is illustrative (except as specified in the binding elements), and it is reproduced on the next page. The plan shows 30 townhouses (five of which are MPDUs), arranged along the southern, western and eastern sides of the site, with a central driveway (an upside down "T"), giving access to all of the units and connecting to Little Falls Parkway on the east. Trucks will not be permitted to use the Little Falls Parkway access.

The SDP also shows access to Butler Road on the north for trucks and delivery vehicles.



In addition to the 13 binding elements and one non-binding element listed above, the SDP also contains General Notes and a Development Program Table, which are reproduced below and on the next page:

GENERAL NOTES:

1. THE SUBJECT PROPERTY IS LOCATED ON TAX ASSESSMENT MAP NO. HM13 WITH A TAX ACCOUNT NO. OF 00421993.
2. THE TOTAL TRACT AREA IS 1.81 ACRES, AND THE PROPERTY IS CURRENTLY ZONED I-1.
3. NRI FILED 3-9-11 WITH M-NCPPC.
4. TRAFFIC STUDY BY WELLS AND ASSOCIATES, MARCH 2011.
5. THERE ARE NO FORESTED AREAS LOCATED ON THE SUBJECT PROPERTY AS DEFINED BY MONTGOMERY COUNTY FOREST LEGISLATION.
6. THE SUBJECT PROPERTY IS NOT IDENTIFIED IN THE MONTGOMERY COUNTY LOCATIONAL ATLAS AND INDEX OF HISTORIC SITES.
7. THE SUBJECT PROPERTY IS LOCATED IN THE LITTLE FALLS BRANCH WATERSHED, A CLASS I STREAM.
8. THE PROPOSED WATER AND SEWER SERVICE WILL BE PUBLIC. THE EXISTING WATER AND SEWER CATEGORIES FOR THIS SITE ARE W-1/S-1.
9. THE SUBJECT PROPERTY WAS FIELD SURVEYED BY VIKI, ON FEBRUARY 1, 2011.
10. THE SUBJECT PROPERTY IS LOCATED ON WSSC MAP 207NW05.
11. THE HORIZONTAL DATUM IS MARYLAND STATE PLANE (NAD83) BASED ON COORS STATIONS ZDC-1 & USNO.
12. THE VERTICAL DATUM IS BASED ON NGVD29 PER THE FOLLOWING W.S.S.C. BENCHMARKS:
 - BM 415 - BM "A", STEEL BOLT IN NORTH END OF HEADWALL, EAST SIDE OF R/R TRACKS, 800' SOUTH OF RIVER ROAD, ELEVATION 228.009
 - BM "B", METAL RIVET WITH ITS TOP BROKEN OFF, ELEVATION 227.306
13. APPLICANT IS UTILIZING THE WAIVER PROVISION OF SECTION 59-C-1.74(d)(2) THAT ALLOWS THE ROW DESIGN PROVISIONS AND THE 2 FOOT BUILDING LINE VARIATION OF 59-C-1.722 TO BE WAIVED IF, THE OPTIONAL METHOD MPDU DENSITY BONUS SECTION OF THE ORDINANCE IS BEING USED, AS IT IS IN THIS CASE.
14. FINAL NUMBER AND LOCATION OF MPDU UNITS SHALL BE DETERMINED AT TIME OF FINAL SITE PLAN/BUILDING PERMIT IN ACCORDANCE WITH MONTGOMERY COUNTY CODE SECTION 25A-5.
15. IN ADDITION TO THE PARKING SPACES PROVIDED FOR IN BINDING ELEMENT #5, NUMEROUS ADDITIONAL PARKING SPACES WILL BE AVAILABLE IN THE MARKET RATE TOWNHOUSE DRIVEWAYS. WHILE THE ACTUAL NUMBER WILL BE ESTABLISHED AT SITE PLAN, THIS ILLUSTRATIVE LAYOUT PROVIDES FOR 10 STANDARD SPACES (8.5'x18') AND 39 COMPACT SPACES (7.5'x16.5'), FOR A TOTAL OF 49 ADDITIONAL GUEST PARKING SPACES.

DEVELOPMENT PROGRAM

THE PROJECT IS INTENDED TO BE DEVELOPED IN ONE PHASE.

SITE DATA

EXISTING ZONING	I-1
PROPOSED ZONING	RT-15
EXISTING USE	COMMERCIAL/INDUSTRIAL
PROPOSED USE	RESIDENTIAL - SFA

DEVELOPMENT STANDARDS - RT 15

	REQUIRED/ALLOWED	PROVIDED
TRACT AREA -- SF	40,000	78,935
TRACT AREA -- ACRES	0.91827	1.81210

DENSITY

	REQUIRED/ALLOWED	PROVIDED
MAXIMUM DENSITY PERMITTED AT 12.5% MPDU	15/ACRE	
MAXIMUM UNITS WITH 12.5% MPDU'S (GROSS TRACT x 15 DU/AC)	27 UNITS	
MAXIMUM DENSITY PERMITTED AT 15% MPDU -- 22% BONUS	18.3/ACRE	
MAXIMUM UNITS WITH 15% MPDU'S (GROSS TRACT x 15 DU/AC X 1.22 BONUS)	33 UNITS	
MAXIMUM DENSITY PERMITTED AT 13.7% MPDU -- 12% BONUS	16.8/ACRE	
MAXIMUM UNITS WITH 13.7% MPDU'S (GROSS TRACT x 15 DU/AC X 1.12 BONUS)	30 UNITS	30
MODERATELY PRICED DWELLING UNITS (MPDUs) AT 30 TOTAL UNITS PROPOSED	13.70%	16.67%
	4.11	5
	(ROUNDS UP TO 5)	

BUILDING SETBACKS*

	REQUIRED	PROVIDED
-FROM ANY DETACHED DWELLING LOT OR LAND CLASSIFIED IN A ONE-FAMILY, DETACHED, RESIDENTIAL ZONE.	30 FEET MINIMUM	20 FEET*
-FROM ANY PUBLIC STREET	20 FEET MINIMUM	20 FEET MINIMUM
-FROM AN ADJOINING LOT		
SIDE	8 FEET MINIMUM	8 FEET MINIMUM
REAR	20 FEET MINIMUM	20 FEET MINIMUM

BUILDING HEIGHT

MAIN BUILDING	35 FEET MAXIMUM	35 FEET MAXIMUM
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GREEN AREA (SF)

	REQUIRED	PROVIDED
MINIMUM GREEN COVERAGE	30%	30%

OFF STREET PARKING**

	REQUIRED	
2 PER MARKET RATE UNIT	50	
2 PER MPDU UNIT	10	
TOTAL	60	

PROVIDED PARKING**

	PROVIDED
25 MARKET RATE UNITS WITH 2 CAR GARAGE	50
5 MPDU UNITS WITH 1 CAR GARAGE	5
PRIVATE ON-STREET + VISITOR PARKING SURFACE SPACES (including one HC space)	8
TOTAL ON-SITE PARKING PROPOSED (2.10 SPACES/DWELLING UNIT)**	63**

*UNDER SECTION 59-C-1.732 OF THE MONTGOMERY COUNTY ZONING ORDINANCE, THE SETBACKS CAN BE REDUCED IF A MORE DESIRABLE FORM OF DEVELOPMENT CAN BE DEMONSTRATED BY THE APPLICANT TO THE SATISFACTION OF THE MONTGOMERY COUNTY PLANNING BOARD.

**PARKING TABULATION IS ILLUSTRATIVE. FINAL TABULATIONS/CALCULATIONS TO BE DETERMINED AS PART OF SITE PLAN APPROVAL BY THE MONTGOMERY COUNTY PLANNING BOARD. IN ADDITION TO THE DESIGNATED SPACES, ADDITIONAL AREAS FOR PARKING WILL BE PROVIDED IN THE PRIVATE DRIVEWAYS.

As mentioned earlier in this report, the subject site is adjacent to parkland on three sides, with Little Falls Parkway to the east and the Capital Crescent Trail to the west. Prior to the hearing, M-NCPPC agreed to an easement over the parkland to the east of the site so that the proposed townhouse residents will be able to access Little Falls Parkway. Exhibits 42-44. Development of the site will also include a public access easement, to be constructed by the Applicant and maintained by the Applicant or the successor Homeowners Association for the site, to enable pedestrians and bicyclists to traverse the site for access from Little Falls Parkway to and from the Capital Crescent Trail. *See* Binding Element 10. Both of these easement areas are labeled on the SDP reproduced on page 17 of this report.

Binding Element 7 requires Applicant to execute the Little Falls Parkway Easement Agreement (Exhibit 43(a)), prior to site plan approval and to thereafter carry out its terms. Those terms include various “public amenity projects” which will be discussed in Part III. I. of this report. Binding Element 8 limits the use of that access to passenger vehicles, bicycles and pedestrians traveling to and from the townhouse dwelling units, and to pedestrians and bicycles traveling to or from the Capital Crescent Trail. Truck ingress to and egress from the site will be solely via a connection to Butler Road, pursuant to Binding Element 9, with such connection having a traffic control mechanism(s) restricting through traffic from Butler Road to Little Falls Parkway and Little Falls Parkway to Butler Road, so as to prevent cut-through traffic by any vehicle use not associated with the development.

Binding Element 5 specifies that each market rate unit will provide garage parking spaces for at least 2 cars, and each MPDU will provide garage parking spaces for at least 1 car. Moreover, at least 2 of the MPDUs will also have a dedicated second parking space, and a minimum of eight (8) additional non-driveway parking spaces will be provided on the site, as shown on the SDP. Thus, assuming that a 30 unit development with five MPDUs is approved, the total parking for the site will consist of at least 65 parking spaces ($25 \times 2 = 50$ Market rate garage spaces + 5 MPDU garage spaces

+ 2 MPDU dedicated spaces + 8 guest spaces). This figure exceeds the number of spaces required for the site by Zoning Ordinance §59-E-3.7, which calls for two spaces per unit (*i.e.*, a total of 60 spaces). The SDP parking table refers to 63 spaces being provided, rather than 65, because Technical Staff has not yet approved the location of the two additional dedicated spaces for the MPDU units.

Nevertheless, the Citizens Coordinating Committee on Friendship Heights (CCCFH) expressed concern that the eight guest spaces proposed by Applicant would not be sufficient, and since there are rarely any parking spaces available on nearby Butler Road, visitors would end up parking on adjacent parkland. Tr. 133-153; 285-299.

Applicant addressed this concern in two ways. It agreed to a binding element (#6), which specifies that, subject to approval of the Maryland National Capital Park and Planning Commission, Applicant will install “no parking” signs along that portion of Little Falls Parkway that confronts the site. Applicant also will include in its HOA documents a confirmation that parking is prohibited on and along Little Falls Parkway.

In addition, Applicant observed the following, in General Note 15 on the SDP:

15. IN ADDITION TO THE PARKING SPACES PROVIDED FOR IN BINDING ELEMENT #5, NUMEROUS ADDITIONAL PARKING SPACES WILL BE AVAILABLE IN THE MARKET RATE TOWNHOUSE DRIVEWAYS. WHILE THE ACTUAL NUMBER WILL BE ESTABLISHED AT SITE PLAN, THIS ILLUSTRATIVE LAYOUT PROVIDES FOR 10 STANDARD SPACES (8.5'x18') AND 39 COMPACT SPACES (7.5'x16.5'), FOR A TOTAL OF 49 ADDITIONAL GUEST PARKING SPACES.

Although these additional spaces are not part of the binding elements, the fact that the planned driveways may well provide many additional parking spaces should make it much more likely that CCCFH’s fears about overflow parking on the site will not become a reality.⁵ As noted by the Planning Board in its letter of July 20, 2011 (Exhibit 38), the parking sufficiency issues will be addressed at site plan review. Given that Applicant’s plan surpasses the minimum parking required

⁵ Applicant produced a Parking Exhibit (Exhibit 60(e)) which indicates the possible locations of the additional driveway parking spaces. Applicant also suggested that Butler Road might provide additional spaces (Tr. 172-173), but as testified to by Ann McDonald of CCCFH (Tr. 148-149) and as shown in photos produced by CCCFH, parking on Butler Road is very scarce and cannot be relied upon to satisfy the parking needs of the proposed development.

by the Zoning Ordinance, and in fact the available driveway spaces may result in a total far exceeding that minimum, the Hearing Examiner agrees with the Planning Board that the details of the parking provided should be left to site plan review.

Applicant's transportation planner, Chris Kabatt, testified that sight distances at the possible locations for the proposed access to Little Falls Parkway were adequate, and that the proposed access points to the site would be safe, adequate and efficient. Tr. 315. He further testified that the internal circulation would be safe and adequate for vehicles and pedestrians, and would be sufficient for access by fire trucks. Tr. 315-316. There is no contradictory expert evidence on the point, and the Hearing Examiner therefore finds that the planned access locations and circulation are not unsafe.

F. Development Standards for the Zone

Special regulations for the RT-15 Zone are spelled out in Zoning Ordinance §59-C-1.72, beginning with the stated "Intent and Purpose" of the Zone in §59-C-1.721. The issue of whether the subject application comports with the intent and purpose of the RT-15 Zone is discussed later, in Part V.A. of this report. We turn now to the other regulations of the Zone.

Although one stated intent of the R-T Zone is "to provide the maximum amount of freedom possible in the design of townhouses and their grouping," the Zone nevertheless has special row design requirements for townhomes. Zoning Code §59-C-1.722. That provision specifies that the maximum number of townhouses in a group is eight; and three continuous, attached townhouses are the maximum number permitted with the same front building line. It also provides that variations in the building line must be at least 2 feet. However, Zoning Ordinance §59-C-1.74(d)(2) provides that the row design requirements of §59-C-1.722 may be waived if necessary to accommodate increased density because of the inclusion of MPDUs.

Applicant's General Note #13 indicates that it is seeking to apply this waiver provision to allow one of the rows of townhouses to include nine units (*i.e.*, one over the limit of eight) and to

eliminate the two foot variation every three units. The Technical Staff report supported the waiver regarding the row of nine units, but did not address the two-foot variation issue. Exhibit 30, p. 10.

The Development Standards for the RT-15 Zone are spelled out in Zoning Ordinance §§59-C-1.73 and 1.74. Those standards and Applicant's proposal are shown below in a table from the Technical Staff report (Exhibit 30, p. 11):

Development Standard	Required	Proposed	Applicable Zoning Provision
Minimum Tract Area	40,000 sq ft (0.92 acres)	1.81 acres	§59-C-1.731(a)
Maximum Density	15 dwelling units per acre (18.3 dwelling units per acre with full MPDU density bonus)	16.8 dwelling units per acre (because of MPDU density bonus)	§59-C-1.731(b)
Building Setback from Land Classified in One- family Detached Zone	30 ft	20 ft	§59-C-1.732(a)
Building Setback from Public Street	20 ft	86 ft	§59-C-1.732(b)
Building Setback from an Adjoining Side Lot	8 ft	8 ft	§59-C-1.732(c)(1)
Building Setback from an Adjoining Rear Lot	20 ft	20 ft	§59-C-1.732(c)(2)
Max Building Height	35 ft	35 ft	§59-C-1.733(a)
Minimum Percentage of Green Area	30 percent	30 percent (40 illustrated on plan)	§59-C-1.74(b)
Parking ⁶	2 spaces per unit = 60 Total Spaces	63 to 65 spaces	§59-C-1.735 and §59-E-3.7
MPDUs	12.5 percent	16 percent	Chapter 25A of County Code

⁶ The Hearing Examiner changed the figures in the Table for parking because 60 spaces, not 58 (as indicated in the original Table), are required for 30 townhouse units and because Applicant increased the number of proposed spaces at the hearing from 63 to 65, as reflected in Binding Element 5 of the revised SDP (Exhibit 69). Technical Staff recognizes only 63 of the spaces at this juncture (Exhibits 68(a) and (c)).

As demonstrated in the Table, the proposed development would meet or exceed the applicable development standards for the RT-15 Zone, except for the requirement of a 30-foot setback from land classified in a one-family detached zone. Applicant proposes a 20-foot setback from the neighboring parkland on the east, south and west, which is classified in the R-60 Zone (*i.e.*, a one-family detached zone). Zoning Ordinance §59-C-1.732(a), Note 1, permits a reduction of the setback if “. . . a more desirable form of development can be demonstrated by the applicant to the satisfaction of the planning board . . .”

Technical Staff recommended approval of the reduced setback, stating (Exhibit 30, p. 10):

. . . the Planning Board can reduce this requirement to a distance equal to the sideyard setback if the applicant can demonstrate that a more desirable form of development will result. A reduction of the setback to 20 feet is recommended for optimum design since the reduced setback allows a site layout where the townhomes are open to the interior of the community and front to the proposed streets. The reduction also is sensible because, although zoned one-family detached, the surrounding land is parkland and is undeveloped.

The Planning Board unanimously recommended approval of the rezoning “for the reasons stated in the Staff Report.” Exhibit 38, p. 1. The Hearing Examiner agrees, based on this unrefuted evidence at this stage, that the proposed reduction in the setback will cause no harm, and will result in “a more desirable form of development.” However, the final decision on this matter is expressly left to the Planning Board under the language of footnote 1.

Zoning Ordinance §59-C-1.723 is inapplicable because Applicant has not sought to combine R-T-zoned tracts with different residential zones; rather, Applicant seeks to have the entire subject site reclassified into the RT-15 Zone.

In sum, except where the requirements are subject to waivers permitted and recommended in this case, Applicant’s proposal meets the applicable development standards.

G. Consistency with the Sector Plan

The subject site is located in the area subject to the 1982 Westbard Sector Plan. The Sector

Plan contains recommendations directly addressing the subject site (Analysis Area K in the Sector Plan), and Technical Staff discusses those recommendations at some length (Exhibit 30, pp. 11-13).

The thrust of Staff's analysis is contained in the following paragraphs (Exhibit 30, p. 12):

Here, the subject property is specifically recommended for a townhouse redevelopment in the relevant sector plan. . . . On pages 51 and 52, the Plan gives an overarching, specific recommendation for the site that it be downzoned from the property's original I-2 zoning to the I-1 Zone to promote a less intensive use on the site (the property was subsequently rezoned to I-1 through a sectional map amendment). Further, the Plan recommends [on p. 52] that the property is suitable for a townhouse redevelopment if access to Little Falls Parkway is obtained. [The same recommendation is repeated on page 28 of the Plan in paragraph numbered 10.] Access to the site from Little Falls Parkway was recently granted via an easement from the Commission. The Plan states that the R-T 10 Zone would be an appropriate zone for the goal of townhouse redevelopment, but doesn't preclude other potential townhouse floating zones.

Under R-T 10 zoning, the subject property would yield approximately 18 townhomes. At 18 units, no MPDUs are required as the number of units is below the 20-unit threshold to trigger MPDU requirements. At the time the Sector Plan was written, the R-T 15 zone did not exist, but R-T 12.5 did. At R-T 12.5, 22 units could be built with three MPDUs or, with a density bonus, 26 units could be built with four MPDUs. However, both the R-T 10 zone and the R-T 12.5 zone require 50 percent open space, which the applicant has stated makes development at either of these densities economically unfeasible. While staff does not take financial aspects of redevelopment into consideration during a review, the R-T 15 Zone seems acceptable given the surrounding land uses and large amounts of nearby parkland, the transitional nature of this project in relation to the higher residential densities to the west, and the furtherance of County planning policies such as the redevelopment of brownfield sites, the removal of environmental encroachments, and the provision of affordable housing.

Technical Staff also points to secondary recommendations in the Sector Plan that would be implemented by permitting the proposed rezoning. These include improved stormwater management to address industrial runoff and other pollutants (Sector Plan pp. 21, 104-107); reduction of noise created by numerous sources, including industrial uses on the site (Plan pp. 21, 98-102); discouraging construction on steep slopes (Plan p. 107); minimizing impervious areas on a site which is currently 100% impervious and which would contain 30% to 40% green area under the SDP (Plan p. 107); and providing a pedestrian/bike path connecting Little Falls Parkway with the Capital Crescent Trail, which is similar to the pedestrian path recommended on p. 76 of the Sector Plan connecting the

Parkway with Crown street, off of Westbard Avenue.

Since the subject application seeks to have the property rezoned to RT-15, it is obviously not identical to RT-10 zoning mentioned in the Sector Plan as “an appropriate zoning classification” for the site if access can be gained to Little Falls Parkway. Sector Plan, p. 52. However, this fact does not automatically rule out this application because explicit consistency with the Master Plan is not a statutory requirement of the RT-15 Zone.⁷ *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002), citing *Richmarr v. American PCS*, 117 Md. App. 607, 635-51, 701 A.2d 879, 893-901 (1997). Nevertheless, consistency with the Master Plan’s recommendations, goals and objectives is still considered as part of the evaluation of public interest made in every re-zoning case.

The Montgomery County Civic Federation (MCCF) has a different view of the Sector Plan’s recommendations. Jim Humphrey testified on behalf of MCCF that the organization opposed the rezoning because a primary concern of the Federation is over the loss of scarce industrially zoned land in the County. Tr. 267-270. Mr. Humphrey quoted from page 32 of the Westbard Sector Plan,

The Plan recognizes the original and continuing character of Westbard as commercial/industrial and seeks to reinforce this character because of the substantial benefit that it provides to businesses and residents of lower Montgomery County. . . . Without the necessary goods and services in a handy location, commercial trucks and residents’ passenger vehicles would have to travel to similar areas some distance away for services now provided in Westbard. The only other nearby industrial land was zoned out of the Bethesda CBD in 1977 as a result of that Sector Plan. [This point is repeated in a bullet point on page 35 of the Plan.]

⁷ Precisely what is meant by the term “consistent with” in the context of master plans has been the subject of both litigation and legislation. In *Trail v. Terrapin Run*, 403 Md. 523, 548, 569 and 573-574; 943 A.2d 1192 (2008), the Maryland Court of Appeals held that legislative words such as “conform to” a master plan and “consistent with” a master plan were intended to convey the concept of being generally “in harmony with” the master plan, unless the legislation specified otherwise. Subsequently, the Maryland legislature enacted the *Smart, Green, and Growing - Smart and Sustainable Growth Act of 2009*, effective July 1, 2009. That Act amended Md. Ann. Code Art. 66B, § 1.02, in an attempt to define the term “consistent with” to strengthen master plan impact on land use; however, by its terms, the statute does not apply to rezoning applications because they do not constitute an “action” under the legislation. The Hearing Examiner thus concludes that that 2009 legislation does not apply to the instant rezoning application, and even if it did apply to rezonings, it would not determine the outcome in this case because, as mentioned above, consistency with the master plan is not a statutory requirement for the zone sought by Applicant.

MCCF's conclusion was that retention of the I-1 zone for the whole property, even though it is only 1.81 acres in size, would be desirable, and that rezoning it would be a significant loss to the County's portfolio of industrial zoned land.

When questioned by the Hearing Examiner as to whether MCCF's recommendation was consistent with the Sector Plan's recommendation of the RT Zone for this site, Mr. Humphrey replied that "[t]he plan is very schizophrenic" in that respect since it also recommended rezoning to I-1 and possible other industrial uses under I-1. Tr. 271-272.

While the Hearing Examiner recognizes that MCCF has a point about the Sector Plan's recommendation to retain industrially zoned land in the County, as a matter of statutory interpretation, usually the specific governs the general. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992). The Plan recommended efforts to retain industrially zoned land in general, but it specifically noted that the subject site was appropriate for townhouse development if a connection to Little Falls Parkway could be established.⁸ That condition precedent has been met.

Moreover, this particular site, located in the middle of parkland, adjacent to the Capital Crescent Trail and near to residential areas, would seem an odd place to attempt to retain industrially zoned land. It is clear from the language of the Sector Plan that it recommended the I-1 Zone for the Site to reduce in the severity of the previous I-2 Zone's impact on nearby parkland and residences, and its authors felt that the options for residential zoning were limited at the time in the absence of access to Little Falls Parkway. As stated on p. 52 of the Sector Plan,

The options available are limited. The current use is allowed only in the I-2 Zone. The depth of the abutting parkland is thin, making the block plant quite visible; its appearance is somewhat out of place with nearby residences. Rubble from the plant appears to have been discarded down the stream banks. Noise from the plant has been reported by nearby residents, although investigation by County

⁸ Another community witness, Robert Dyer, opined that the Sector Plan's recommendation of an RT Zone on this site (contingent upon access to Little Falls Parkway) is inconsistent with other general observations of the Sector Plan. Tr. 30-33. For the reasons stated above, it would not be appropriate to disregard the specific recommendation of the Sector Plan for townhouse development on the site in favor of anyone's notion of the general tenor of the Plan.

authorities has revealed no violation of the Noise Ordinance. Moreover, retention of the I-2 zoning classification leaves open the possibility of the property being converted to more objectionable uses allowed in that zone. A change to the I-1 Zone would permit the plant to continue in use but be converted only to office, warehouse, light manufacturing, or similar use. Under other circumstances, the abutting park suggests townhouse residential as an appropriate use. However, the fact that the only access is through an industrial street clearly rules out that possibility unless access to Little Falls Parkway were to be authorized.

Recommendations — The I-2 Zone should be changed to I-1 so that any redevelopment would be to some less intensive and more desirable use. Meanwhile, in order to reduce the effect of noise and to improve the appearance from nearby areas and the Parkway, acoustical fencing should be installed in the area abutting the parkland.

If access can be gained off Little Falls Parkway, an appropriate zoning classification would be RT-10.

The Hearing Examiner thus reads the Sector Plan the same way that Technical Staff and the Planning Board did – as a recommendation for townhouse zoning if access could be gained off Little Falls Parkway, not as a recommendation for the I-1 Zone now that access to Little Falls Parkway has been achieved. The general recommendation about preserving industrially zoned land is subsidiary to the specific recommendation for residential zoning. Perhaps more importantly, the townhouse zone makes more sense in this setting, in the middle of parkland, adjacent to the Capital Crescent Trail and near to residential areas. It also will fulfill other objectives of the Sector Plan to reduce impervious areas, improve stormwater management, reduce pollution of the waterways, reduce noise pollution and to provide a pedestrian path connecting Little Falls Parkway with the interior of the sector.

Given this record, the Hearing Examiner finds that although the proposed development would not comport exactly with the RT-10 zone recommendation for the site, it would accomplish the goals and objectives of the Sector Plan for this area.

H. Public Facilities

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and other services will be adequate to support a proposed development, and in turn,

whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process.

The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that are set by the County Council in its Growth Policy. While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case because the Council has the primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Planning Board's process at subdivision is designed to more intensively examine the "nuts and bolts" of public facilities.

At this stage, Zoning Ordinance §59-H-2.4(f) requires Applicant to produce "[s]ufficient information to demonstrate a reasonable probability that available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted." In this case, the application was submitted on April 6, 2011, so the 2009-2011 Growth Policy adopted November 10, 2009 (Resolution 16-1187) will apply to the rezoning determination.

The 2009-2011 Growth Policy provides, at p. 24, "[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated." There is no such evidence in this case. On the contrary, the evidence is that police and fire stations are nearby. Tr. 253.

Public facilities for transportation, schools and utilities, including water and sewer service, are treated under separate headings, below.

1. Transportation

Chris Kabatt, Applicant's expert in traffic engineering and transportation planning, described

the site's surrounding roads and the available transit system. Little Falls Parkway, on the eastern side of this site, is a two-lane road between River Road and Massachusetts Avenue, with a 35 mile an hour posted speed limit. Little Falls Parkway widens at both River Road and Massachusetts Avenue to provide auxiliary turn lanes.

Metrobus operate the T-2 line along River Road, and that operates between Rockville Metro station and the Friendship Heights Metro station, seven days a week. There is also the Ride-On 29 line on River Road that operates seven days a week between the Bethesda Metro station, Glen Echo, and the Friendship Heights Metro station. There are stops for both of these lines at the Butler Road intersection with River Road, which is less than a quarter of a mile from the proposed townhouses.

The Capital Crescent Trail provides a route for bicyclists, walkers and other non-auto users from the Bethesda CBD down to Georgetown. There is an at-grade connection to the trail on the north side of River Road, and Applicant proposes to provide a connection to the trail. The primary vehicular access for the residents would be from Little Falls Parkway, and commercial vehicles would have to enter the community via the secondary driveway on Butler Road, since trucks are not permitted on Little Falls Parkway. Tr. 321-322.

Circulation within the development was described by Charles Irish, Applicant's engineer. The residents will come in off of Little Falls Parkway, turn to the south, through a driveway, and then go to a T intersection to get to their homes. The width of the drive, a private road, will be at least 20 feet in all locations, so that it meets fire-access standards. The turning radius works as well. According to Mr. Irish, it will be safe for pedestrian and vehicular traffic. There are no sidewalks in front of the individual units, but there will be a four-foot wide strip that will serve as a transition from the 20 foot official private road to the private driveways. Tr. 315-316. There will be a sidewalk on the vehicular bridge that connects Little Falls Parkway to the development, and that pedestrian-bicycle path will continue on to connect with the Capital Crescent Trail. Tr. 331-332.

Mr. Kabatt testified that his revised traffic statement (Exhibit 59) reflects the current application for RT-15, with 30 townhomes. The development will generate 14 trips in the morning peak hour and 25 trips in the evening peak hour. Because it will generate fewer than 30 trips during the peak hours, the County's Local Area Transportation Review (LATR) requires Applicant to provide a traffic statement, but not a complete traffic study. Mr. Kabatt also noted that those 25 p.m. peak hour trips generated by the townhouses would displace trips that are already generated by the existing BETCO site. Mr. Kabatt concluded, based on the trip generation and the size of the project, that the surrounding road network will adequately accommodate the proposed development and that the proposed use will not have a significant impact on traffic in the surrounding area. Tr. 323-324.

At the time the application was filed, the Policy Area Mobility Review (PAMR) requirement for the Bethesda-Chevy Chase policy area was 30 percent. Based on the number of new trips generated by the proposed residential use, seven trips are required to be mitigated. The Applicant proposes to make the appropriate identified improvements, or make the appropriate payment, currently valued at \$11,300 per trip, to meet the PAMR requirement. Tr. 324.

Mr. Kabatt also described the functioning of the two access points. He noted that there is a binding element that Applicant will limit access by commercial vehicles to Butler Road. In response to concerns raised by CCCFH about the possibility of cut-through traffic (from River Road, down Butler, and out to Little Falls Parkway on the new access way), he observed that, in addition to signage, there are ways to design the road to discourage cut-through traffic; however, Mr. Kabatt did not view this possible route (*i.e.*, turning onto Butler Road and the townhouse driveway to access Little Falls Parkway), as being a likely cut-through point for commuters. Traffic today turns on streets earlier, such as Ridgely, and makes its way to Westbard and then down to Massachusetts. That would continue to happen. According to Mr. Kabatt, the proximity of Butler Road to Little Falls Parkway doesn't provide that much of a time savings, and so it is unlikely to induce drivers to use

Butler as a cut-through route. Tr. 325-327.

Mr. Kabatt noted that the Montgomery County Department of Transportation's (DOT) letter of June 1, 2011 (Attachment 6 to the Technical Staff report) indicated that the site access and the details for the site access would be determined through the subdivision process, but they did not object to the rezoning. In Mr. Kabatt's professional opinion, the vehicular access will be safe, adequate and efficient, and the site will be adequately served by public roads. Tr. 327-329.

Transportation Planning Staff, in a memorandum appended to the Staff report (Exhibit 30, Attachment 3), agreed that an LATR traffic study was not needed in this case and found that LATR was satisfied. Staff also concurred in Mr. Kabatt's PAMR analysis, noting that Applicant is being given credit for two peak-hour trips that will be eliminated by removal of the BETCO plant, resulting in a net of 23 new trips generated by the proposed development. Thirty percent of 23 trips yields a PAMR mitigation requirement of 7 trips.

Transportation Planning Staff recommended that, at subdivision, the development be limited to 30 townhouses; that all non-commercial traffic be limited to the Little Falls Parkway entrance; and that Applicant must obtain approval from DOT and Technical Staff for an ADA accessible trail connection between Little Falls Parkway and the Capital Crescent Trail. As previously discussed, DOT does not object to the rezoning and the other recommendations are embodied in binding elements on the revised SDP (Exhibit 69). A final determination regarding public facilities will be made at site plan and subdivision review.

Based on this record, the Hearing Examiner finds that Applicant has made the required showing of a reasonable probability that available transportation facilities and services will be adequate to serve the proposed development and that these facilities will not be adversely affected by the proposed development.

2. Utilities

Applicant's civil engineer, Charles Irish, testified that water, sewer, gas, and other utilities are available at capacities adequate to serve the proposed development. This site is currently served by all utilities. An eight inch water main exists in Butler Road and literally abuts the subject property. There is a major sewer line that abuts the property in that area that crosses the creek and continues southerly. The Washington Suburban Sanitary Commission (WSSC), in a memorandum appended to the Technical Staff report as Attachment 2, found that the reclassification from the R-60 Zone to the R-T 15 Zone and the subsequent proposed development would not overburden the water or sewer systems of the area. The property is currently served by gas, as well as electric, and those capacities would be adequate for the project. Tr. 312-313.

Based on this evidence, the Hearing Examiner finds that the property will be served by adequate utilities and other services.

3. Schools

The schools serving the subject property – Westbrook Elementary School, Westland Middle School and Bethesda Chevy-Chase High School – are located within the Bethesda-Chevy Chase cluster. As noted by Technical Staff, Montgomery County Public Schools (MCPS) estimates the impact of the proposed development to be approximately eight elementary school students, four middle school students, and four high school students. Exhibit 30, p. 9.

In a June 27, 2011 e-mail (appended to the Technical Staff report, Exhibit 30, as Attachment 4), Bruce H. Crispell, the Director of Long-Range Planning for the Montgomery County Public Schools, indicates that enrollments at Westbrook Elementary School, Westland Middle School and Bethesda-Chevy Chase High School are all currently over capacity. Although an addition to the Westbrook Elementary School opening in 2013 will bring that facility within capacity at least through 2017, the other facilities are projected to remain over capacity through the 2016-2017 school year.

According to Mr. Crispell, the Council approved a “placeholder” capital project in the Capital Improvements Program to avoid a residential moratorium based on the projected middle school utilization levels above 120 percent. Nevertheless, a school facilities payment at all three levels will be required of the Applicant to obtain subdivision approval during the next phase of review.

The Hearing Examiner takes official notice of the language in the Attachment to Council Resolution 17-141, adopted May 26, 2011, which revises the Capital Improvements Program to add funding for additional middle school classrooms in the Bethesda-Chevy Chase cluster, with the express intent of “avoiding a residential moratorium in the Bethesda-Chevy Chase cluster.” Attachment to Council Resolution 17-141, Part II.

Based on the Council’s clear intent to keep the Bethesda-Chevy Chase cluster out of a residential moratorium by providing additional school facilities as needed, the Hearing Examiner finds that there is a reasonable probability that sufficient school capacity for the proposed development will be available as needed.

I. Environment

Technical Staff reports that a Natural Resources Inventory/Forest Stand Delineation- (NRI/FSD)-Exhibit 27(g)- was approved on June 30, 2011 by Environmental Staff. Staff does not indicate that the property is within a special protection area, but the site is surrounded by parkland to the east, south and west, and it is located at the extreme down-slope of the Willett Branch watershed. The stream runs adjacent to the western boundary of the site, and the associated stream valley buffer encompasses a large portion of the property, including a 100-year floodplain. Although there are no specimen trees or forest on site, there is forest immediately adjacent to the property, and a number of specimen trees are nearby. The site is currently almost entirely impervious, and the existing cinder block factory has created encroachments into parkland on three sides of the property. Staff indicates that these off-site encroachments will need to be restored to a natural condition and appropriate

mitigation for any on-site encroachments to the stream valley buffer will be detailed at subdivision. Exhibit 30, pp. 9-10.

1. Stormwater Management:

Approval of the stormwater management plan is not required until subdivision, and Applicant has not yet submitted its stormwater management concept plan (SWMCP) for this project.

Nevertheless, the Hearing Examiner finds that Applicant has at least demonstrated that a stormwater management plan can be employed for the proposed development which will not have adverse effects on the environment or the adjacent community.

Charles Irish, Applicant's civil engineer, testified that the current runoff from the site comes down from the buildings and onto the pavement, and flows down into the stream channel. There does not appear to be any stormwater management whatsoever on the site now, not even a storm drain. It is almost 94 percent impervious currently, and that is not even counting the almost 10,000 square feet of encroachment into the parkland. The proposed development would be about 66% impervious. Building coverage would be approximately 31 percent. Tr. 304-307.

Mr. Irish reviewed the storm water management concept plan which will be submitted in connection with subdivision. While state law would require using environmental site design to the maximum extent practicable on at least 50 percent of the site area since it is a redevelopment site, under Montgomery County law, Applicant is required to treat 100 percent of the impervious areas on the site to the maximum extent practicable using environmental site design. Mr. Irish is in the process of preparing a plan that will treat most of the site runoff with environmental site design measures. However, if Maryland's Department of the Environment (MDE) or the County do not want infiltration because of potential contaminants, then Applicant would be precluded from most of the environmental site design measures. Absent a concern with the soil quality, Applicant should be able to treat most of the site with environmental site design measures, and a portion that couldn't be

so treated would either be treated structurally, or alternatives would apply which might create some more room for on-site parking. Tr. 307-310.

Mr. Irish further testified that if Applicant did nothing with respect to stormwater management, other than build this site, decreasing the imperviousness from 94 percent to 64 percent and adding the buffer plantings, that in and of itself would be a major improvement. Added to that, Applicant is going to treat the other runoff from the site as well. Based on his experience, he has no doubt that Applicant can meet the appropriate standards for stormwater management. Tr. 311-312.

2. Forest Conservation:

Mr. Irish further testified that the property has no forest on it, and so there is a 15% afforestation requirement, which Applicant would attempt to meet on site. That plan will be submitted in conjunction with the preliminary plan and site plan, which would be a combined submittal to Park and Planning. Tr. 317.

Technical Staff notes that the proposal will be subject to a Forest Conservation Plan (FCP) at later stages of review, which will likely require that afforestation requirements be met on site. Modifications to the proposed townhouse layout may be required to appropriately site the afforestation plantings. Exhibit 30, p. 10.

3. Safe Removal of the Brownfield:

This development will be complicated by the fact that this is a “brownfield site.” Technical Staff report (Exhibit 30, pp. 1, 2, 6, 12, 13 and 17). The Hearing Examiner takes official notice of the definition of a “brownfield site” contained in Public Law 107-118 (H.R. 2869), the “Small Business Liability Relief and Brownfields Revitalization Act,” signed into law January 11, 2002.

DEFINITION OF BROWNFIELD SITE- Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601) is amended by adding at the end the following:

(39) BROWNFIELD SITE-

(A) IN GENERAL- The term "brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

Community witness Robert Dyer raised the question of the impact of the brownfield site on potential development. He testified that the problem originated from an underground fuel spill that occurred on Butler Road at a former fuel transfer facility, which left toxic "MTBEs"⁹ that have now been found on the Hoyt property. He is concerned about allowing this development because the land disturbance may result in the MTBEs leaking into the underground water supply. Tr. 50-52. When asked by the Hearing Examiner whether he had some evidence that the excavation could not be done safely, Mr. Dyer indicated that he did not. Tr. 53.

Applicant's engineer, Charles Irish, while noting that he is not an environmental engineer or specialist with respect to contaminants, stated that Applicant is handling the issue of contaminants through the Maryland Department of Environment. Nothing can be done on the site until Applicant gets "a clean bill of health from them with respect to our plan." Tr. 310.

Technical Staff notes that redevelopment of brownfield sites is in "furtherance of County planning policies." Exhibit 30, p. 12.

Based on this record, the Hearing Examiner is satisfied that any environmental concerns on the subject site are being appropriately addressed. While citizens are justifiably concerned about the proper handling of soil contaminants to avoid their seepage into the ground water, questions relating to the method for safely addressing the brownfield are clearly not part of the re-zoning process, but will be fully addressed at later stages of the development.

4. Environmental Concerns about the Proposed Bridge over Parkland:

One of the concerns raised in this case is that the proposed bridge over parkland to allow

⁹ The Hearing Examiner takes official notice that the term "MTBE" stands for Methyl Tertiary Butyl Ether, a fuel additive in motor gasoline, according to the website of the U.S. Environmental Protection Agency, www.epa.gov.

access to Little Falls Parkway from the proposed development will be an unwelcome intrusion into the limited parkland in the area. CCCFH initially noted its opposition based on that potential, but M-NCPPC having agreed to the Easement Agreement that makes it possible, CCCFH felt it was now a moot point and supports the development if parking issues can be resolved. Exhibit 37(a).

One community witness, Robert Dyer, still opposes the development based on the loss of parkland. Mr. Dyer testified that the project would not be in the public interest because it would intrude into parkland which is scarce in this area. Tr. 35-36. As he stated (Tr. 36):

. . . And so the only green space you find in the area is Little Falls Stream Valley Park, which Little Falls Parkway goes through and . . . the parkway on this section is entirely controlled access. It's a natural environment. And so when this is brought in, you now have an ugly intrusion. . . .

Mr. Dyer feels that the existing BETCO plant is not as visible from Little Falls Parkway as Applicant has portrayed it. He emphasized that his opposition is not to a residential development on the site, *per se*, but to the Little Falls Parkway access. Given that, he opposes the development. He also feels that the improvements to be made to the Willet's Branch Creek as part of the Easement agreement will not eliminate all the pollution. Tr. 38-41.

Balanced against Mr. Dyer's negative view of the environmental impacts of the proposed development are the views of Applicant's experts, the strongly held opinions of the Little Falls Watershed Alliance (LFWA), and the recommendations of Technical Staff and the Planning Board.

5. Environmental Benefits from the Proposed Development and from the Easement Agreement:

Although we usually examine potentially adverse environmental impacts from a proposed development, in this case there should be significant environmental benefits, as well. As already mentioned, there will be a substantial reduction in the impervious area, from 94 percent to 64 percent, the introduction of a stormwater management system, the elimination of a brownfield and the reclamation of encroachments into parkland. These changes will also improve water quality, which is why the proposal is so strongly supported by the Little Falls Watershed Alliance (LFWA).

Dan Dozier, LFWA's co-president, testified (Tr. 115-133) that there are over 20 neighborhoods in the watershed, which includes the Little Falls Creek, the Willet Creek and the Minihana Creek and their branches. According to Mr. Dozier, the Little Falls Watershed is classified by the County Department of Environmental Protection as one of the most impaired watersheds in the County. Much of the watershed and the creeks are contained in artificial pipes that were installed when development occurred. Those pipes have very adverse effects on the water quality, in terms of stream flow, speed, heat and picking up urban runoff. Tr. 116-118.

In Mr. Dozier's words, "The current industrial use on this property [*i.e.*, the subject site] . . . has been and is an environmental disaster. . . . This use is totally inappropriate located where it is, located next to the creek. It's an example of the type of urban development that's had such an adverse impact on our watershed." Tr. 118.

When asked by the Hearing Examiner whether he favors this rezoning, he stated, "Yes, sir. Absolutely." Tr. 118. He added (Tr. 118-119),

The reason, the paving on that creek leads to significant sediment contamination that flows right off. The rain falls on that pad, and flows right into the creek, which is right next to it, carrying the sediment. And there's a great deal of sediment that gets located on that concrete pad because of the brick and block that's being shipped in and out. Plus, the contamination from the trucks that come in there, and that gets washed off, the grease and the oil that leak [into] the creek.

Mr. Dozier recognizes that there was a lot of controversy about the easement across the creek to access Little Falls Parkway, but "from our perspective, this development is better for the environment than the current use. Period." Tr. 121. He stated that "Removing that concrete pad and having the property subject to the new storm water regulations will improve water quality in the area, in the most important and most sensitive area of the creek to aquatic creatures." Tr. 122.

Mr. Dozier is also satisfied with the binding elements that call for Applicant to remove and clean up paving and debris from the site and to implement projects which may include stream

restoration and other environmental projects. This language is contained in Binding Elements 11 and 12.

Mr. Dozier also mentioned that converting the site from industrial to residential will eliminate a great deal of noise and air pollution from the area. He stated that there are many trucks going in and out of the BETCO site daily because it is now used as a transshipping facility, and their activity creates a lot of dust and noise. Tr. 131-132.

Finally, as part of its Easement agreement with M-NCPPC (Exhibit 43(a), p. ¶¶2, 3 and 8), the Applicant will be required to:

2. . . . implement, or make financial contributions to implement, certain public amenity projects as requested by Commission staff to enhance the surrounding community and parkland. The public amenity projects may include, but are not limited to:

- a. A stream restoration project to naturalize the existing concrete channel along the eastern frontage of the property; and
- b. A non-native invasive species management program for designated areas within Little Falls Stream Valley Park and the Capital Crescent Trail as part of natural habitat restoration efforts for the parks; and
- c. A trail renovation/maintenance project to refurbish the four-foot-wide shoulder of the Capital Crescent Trail; and
- d. Purchase of radar speed display signs for use by the Commission as traffic calming measures along Little Falls Parkway, the Little Falls Trail, the Capital Crescent Trail, and roadways which impact Commission owned, managed or maintained trails.

Some of the above referenced public amenity projects may be modified or replaced with other suitable projects depending on the timing of development approvals of the proposed residential development and the schedule of individual amenity projects.

3. Grantee shall contribute \$500,000 as consideration for the Easement which sum is to be used to implement the amenity projects referenced above or will constitute the financial contribution mentioned above, . . .

8. In addition to the commitments/payment recited above, as part of the Site Plan approval process, Grantee will provide: (1) a public access easement for pedestrians and bicycles to traverse the Development Site for access from the Little Falls Parkway Easement to and from the Capital Crescent Trail and (2) a green landscape easement

granted to the Maryland-National Capital Park and Planning Commission, primarily along the edge of the property adjoining the Capital Crescent Trail and possibly elsewhere on the Development Site, as an aesthetic green space that can be viewed by users of the park and/or trail. Such easement areas shall be at least equal in gross area to the gross area of the easement identified in Paragraph 1 above.

The terms of this easement agreement for environmental improvement are essentially echoed in Binding Elements 7, 8, 9, 10, 12 and 13. In addition, Applicant has agreed, in a non-binding element, to,

. . . cooperate with the Capital Crescent Trail Coalition and other civic organizations to urge the appropriate governmental agencies to use the money required to be paid by Applicant pursuant to PAMR and some portion of funds Applicant is paying as consideration for the Easement Agreement for constructing improvements to the Capital Crescent Trail in the vicinity of River Road to facilitate and promote bicycling.

As previously mentioned, both Technical Staff and the Planning Board support the rezoning. Technical Staff noted the environmental benefits from the development in its discussion of the public interest (Exhibit 30, p. 17):

. . . Environmental improvements to the site will be provided in the form of updated stormwater management facilities and the removal of encroachments into adjacent parkland . . .

The Planning Board, after a lengthy process including a number of public hearings, approved the Easement Agreement (Exhibit 43(a)), which allows the access to Little Falls Parkway across public land and which provides for the environmental amenities discussed above.

In sum, the Hearing Examiner finds the evidence overwhelming that this project will be a net benefit to the environment, rather than a detriment.

J. Community Concerns

As discussed in other parts of this report, there was both support and opposition from the community regarding this project. The proposed development was strongly supported by the testimony of Dan Dozier, on behalf of the Little Falls Watershed Alliance (LFWA), because eliminating the current industrial use will greatly improve water quality and reduce noise in the area.

The proposed rezoning was conditionally supported by testimony from two witnesses on behalf of the Citizens Coordinating Committee on Friendship Heights (CCCFH). CCCFH had been opposed to the granting of an easement across public land to provide access to the proposed development, but that having been agreed to by the M-NCPPC, the group now supports the proposed rezoning if issues relating to the quantity of parking can be resolved.¹⁰ Peter Salinger of CCCFH also raised a concern about the possibility of traffic cutting through his neighborhood to avoid backups on River Road.

Jenny Sue Dunner testified on behalf of the Coalition for the Capital Crescent Trail (CCCT). Although her organization takes no position on rezoning applications, she noted that the proposal includes a connection with the Capital Crescent Trail which will result in fewer cars on the roads.

Jim Humphrey testified on behalf of the Montgomery County Civic Federation (MCCF), which opposed the rezoning because it feels that the Master Plan calls for retention of industrial uses in the County, and that the proposed project would not meet all R-T Zone standards. The only other opposition came from Robert Dyer, a citizen who lives about a half a mile away from the site, outside the defined surrounding area.¹¹ He opposed the proposal because of the easement over parkland and because he feels that the proposed development will be incompatible with nearby industrial and commercial sites. He also raised concerns about the possible impacts on ground water during the process of eliminating the brownfield on site.

All these issues are discussed at length in other parts of this report. The parking issues were discussed in Part III. E. at pp. 21-22, and will be thoroughly addressed at site plan review, as promised by the Planning Board. Exhibit 38, p. 3. The cut-through traffic issue was discussed in Part III. H. 1 of this report at pp. 31-32. Environmental concerns were addressed in Part III. I. of this

¹⁰ Two witnesses testified for CCCFH, Ann McDonald, an officer of the organization and Peter Salinger, a member. Their testimony differed as to the impact of the parking issues. Ms. McDonald stated that even if the parking issue could not be resolved at this stage, CCCFH would support the rezoning (Tr. 150-152), while Mr. Salinger, supported by CCCFH's attorney, testified that CCCFH's support was premised upon EYA resolving the parking concerns. Tr. 291-293.

¹¹ Applicant's land planner estimated the distance from Mr. Dyer's home to the site as about 1200 feet (Tr. 62), but the actual location of the home was off of the exhibit being used (Exhibit 40) so the estimate understated the distance. The Hearing Examiner takes official notice from Google maps of the area that the distance is about a half a mile.

report, at pp. 34-41. Issues relating to the proper interpretation of the Sector Plan were discussed in Part III. G. of this report, at pp. 24-28. Compatibility issues will be discussed in Part V.B. of this report, at pp. 77-79.

The decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Applicant’s proposal against the specific criteria established by the Zoning Ordinance, and to evaluate compatibility and the public interest. The evidence produced by both sides must be considered in that analysis, but the facts and the law ultimately determine whether a rezoning application should be granted. As discussed in Part V of this report, the Hearing Examiner finds that the application satisfies the criteria for rezoning the subject site to the RT-15 Zone.

IV. SUMMARY OF HEARING

A public hearing was duly noticed and convened on July 25, 2011, at which time the Applicant presented testimony from five witnesses in support of the application – Bob Youngentob, Applicant’s president; Aakash Thakker, Applicant’s senior vice president; William Landfair, an expert in land planning; Charles Irish, a civil engineer; and Chris Kabatt, an expert in transportation planning.

Applicant also introduced a copy of its Easement Agreement with the Maryland-National Capital Park and Planning Commission (Exhibit 43(a)), allowing it access to Little Falls Parkway across parkland, and specified additional binding elements for its schematic development plan, negotiated with the community, bringing the total of proposed binding elements to thirteen.

The proposed development was supported by the testimony of Dan Dozier, on behalf of the Little Falls Watershed Alliance (LFWA), and was conditionally supported by testimony from two witnesses on behalf of the Citizens Coordinating Committee on Friendship Heights (CCCFH), Ann McDonald and Peter Salinger. Jenny Sue Dunner testified on behalf of the Coalition for the Capital

Crescent Trail (CCCT), which takes no position on rezoning applications.

Jim Humphrey testified on behalf of the Montgomery County Civic Federation (MCCF), which opposed the rezoning, as did Robert Dyer, a citizen who lives about a half a mile away from the site, outside the defined surrounding area.

The record was held open at the conclusion of the hearing for the filing, by the Applicant, of the executed covenants and revised plans, including the agreed-to additional binding elements, and for responses thereto by Technical Staff and interested parties.

A. Applicant's Case in Chief

1. Bob Youngentob (Tr. 62-95; 154-220):

Bob Youngentob testified that he is the president of EYA Development, which is headquartered in Bethesda. Mr. Youngentob described his background and that of his company. He was offered by Applicant as an expert in "urban infill" as well as a fact witness; however, the Hearing Examiner decided not to allow him to testify as an expert because he is the Applicant's president; because the Hearing Examiner does not recognize "urban infill" as an area of recognized expertise, as distinguished from land planning; and because he was not listed as an expert in pre-hearing filings, as is required. Applicant did not object to this ruling. Tr. 62-70.

Mr. Youngentob used a PowerPoint program to support his testimony that EYA considers itself a smart growth developer which tries to place its developments in areas that benefit from existing infrastructure, where people have amenities that they can walk or bike to, and therefore place less reliance on their cars. He observed that the baby boomers are looking for situations where they have lower maintenance, and where they have access to recreational as well as retail amenities. Moreover, younger professionals coming into the workforce no longer view the single family home in the suburbs as the American dream, but have the requirements of both husband and wife to be working, and therefore need greater accessibility and shorter commutes. Hence, they want to live in

closer-in locations and have better access to amenities. Tr. 72-74. His company has focused on meeting those needs in other developments and at the subject site.

The Applicant proposes to remove the existing industrial use (BETCO cinder block plant) and construct twenty-five market-rate units with two-car garages and five moderately priced dwelling units with one-car garages. Mr. Youngentob views the BETCO cinder block plant currently on the site as “something that really didn't fit in the overall concept of this setting of the park.” Tr. 76. He considered the recommendation of the 1982 Westbard Sector Plan for townhouse development of this site, but felt that without access to Little Falls Parkway, the site was really not appropriate for residential development. Applicant's proposal therefore calls for the primary access to the proposed townhouses to be off of Little Falls Parkway, and because Little Falls Parkway has a prohibition against commercial vehicles, there would be a secondary access off of Butler Road for commercial vehicles, trash pickup, delivery services, and the like. Tr. 76-78.

Mr. Youngentob feels that the proposed development will result in “quality of life improvements” for County residents. Tr. 73-74. The proposed location is close to the retail available in the Westbard area and even closer to the Capital Crescent Trail, which residents will be able to access by bicycle and foot via a public access easement to be constructed by the Applicant.

Mr. Youngentob described the process with Montgomery County to develop the concept of an easement agreement to provide access to Little Falls Parkway. It also provides compensation to the County of \$500,000 that specifically addresses particular improvements to the park and the stream and possibly the Capital Crescent Trail. Tr. 79-80. A copy of that easement agreement, still unexecuted, was introduced as Exhibit 43(a), as were resolutions of the Planning Board, the Maryland-National Capital Park and Planning Commission and the National Capital Planning Commission relating to the easement agreement.

Although the final version of the Easement Agreement has been filed (Exhibit 43(a)), it

cannot be executed unless and until the rezoning is approved because it requires Applicant to make a \$100,000 payment to M-NCPPC upon execution. Mr. Youngentob offered to have the agreement in this form with a binding element requiring it to be executed upon the decision of the District Council or prior to preliminary plan. [Mr. Knopf indicated that CCCFH had no objection to that procedure.] Tr. 154-155.

Mr. Youngentob further described the current state of the site. The facility was actually a manufacturing facility for brick and block, but is now currently used primarily as a distribution facility. Some of the demolished components of the facility have been dumped in the rear of the property and some dumped off site encroaching into the parkland. In his opinion, the property has been clearly used in a way that is not as compatible to parkland as residential would be. The stream channel through the site is actually a concrete culvert. He introduced photos of the site. Tr. 156-157.

The five MPDU units are disbursed throughout the development. There is one located on Lot number 7, three on Lots 23, 24 and 25, and then one on Lot 21. Applicant intends a decorative paving treatment of the edge of the drive isle. The drive isle is proposed at 20 feet. The decorative paving would be four feet on either side of that, basically, to delineate from the drive isle itself. Tr. 159.

The truck access to Butler Road is on the northern end of the property across the easement connecting to Butler Road. Mr. Youngentob also pointed out the location of the eight visitor parking spaces. He stated that the total green area is somewhere in the 34 percent range, which exceeds the 30 percent that's required in the RT-15 zone, compared to about 6 percent today. Tr. 161.

Applicant proposes that access to the Capital Crescent Trail from Little Falls Parkway enter the site at the extreme northern end, adjacent to the private roadway, and continue adjacent to lot 21 on the northern boundary of the property, and then go off property and connect to the Capital Crescent Trail. Tr. 161-162.

Mr. Youngentob further testified that Applicant will provide at least 63 parking spaces and that he agreed that the 20% reduction of required parking spaces for MPDUs that had been suggested in the SDP did not apply, so the requirement would be 60 spaces. Tr. 162-162. He understands parking is an issue. He noted that certain of the MPDU units, for example, on Lot 21 and on Lot 7, a minimum of two additional spaces could be added, and have the count actually at 65. Tr. 163. Mr. Youngentob also introduced a diagram (Exhibit 48) showing how additional driveway spaces could be provided for other units, ultimately resulting in 52 additional guest spaces on the site, 20 of which would be for compact cars and 32 of which would be for standard cars, but would be six inches narrower than a standard space. [These figures were later modified in a non-binding note on the revised SDP to 10 standard spaces and 39 compact spaces, for a total of 49 potential additional guest spaces.] Tr. 164-171. Mr. Youngentob also suggested that when there is a party either in the evenings or on the weekends, Butler Road might be usable for some overflow parking, and he raised the possibility of valet parking for special events. Tr. 172-173.

Mr. Youngentob testified that Applicant will seek a waiver of the statutory row requirements, including the number of units in a row and the two-foot offset provision. Tr. 175-178. He then introduced the revised binding elements (twelve in number at that time) as Exhibit 51. Tr. 182.

Mr. Youngentob feels that the RT-15 density is appropriate and compatible for this site. At the time the Sector Plan was done, the RT-15 Zone didn't exist. The whole concept of urban town home densities was not really thought of at that stage. The whole pressure to bring development back in close didn't exist. At an RT-10 density, there would not be enough value for the land owner and for the operating business to relocate. In any situation where there are brownfields and need to relocate an operating business, there needs to be some type of density bonus or density incentive. In his opinion, RT-10 is not the appropriate density for this site from a land planning standpoint, given the surrounding area densities, and from a practical standpoint, an RT-10 would not create enough

land value and would not provide the MPDUs to go with this project. For the public benefit of all, the density is a necessary requirement to see this development actually happen. Tr. 188-189.

Mr. Youngentob testified that outreach to the community started back in June of 2010, with the Citizen's Coordinating Committee of Friendship Heights that represented all the neighborhood associations, including Mr. Dyer's, that were covered in the area. Tr. 190.

Mr. Youngentob indicated that Butler Road is publicly maintained from River Road all the way south to a point about 60 to 70 feet north of the subject site. Tr. 218.

2. Aakash Thakker (Tr. 95-115):

Aakash Thakker testified that he is a senior vice president with EYA and has been working closely on this project. He outlined the approval process for the easement before the National Capital Planning Commission (NCPC). His testimony mostly concerned the process which occurred after the easement was conceptually approved by the Montgomery County Planning Board at a public hearing on January 20, 2011 (Exhibit 43), and after the full M-NCPPC had approved the easement, which occurred on February 16, 2011 (Exhibit 42). It also was after the Planning Board approved the draft Easement Agreement (Exhibit 43) on June 16, 2011, at a public hearing.

The easement could not be granted by the Maryland authorities without the prior approval of the National Capital Planning Commission (NCPC). The NCPC does not have to sign off on the actual language of the easement agreement, but must approve M-NCPPC getting into an agreement to grant the easement.

The process with NCPC requires the filing of an environmental assessment. So Montgomery County Parks Department, together with EYA, put together an environmental assessment. Three alternative locations for the easement were considered, Alternative C being the location where the SDP currently shows the access off of Little Falls Parkway to the subject property. That was submitted to the National Capital Planning Commission staff, which reviewed the environmental

assessment and made a recommendation of approval of Alternative C to the National Capital Planning Commission.

The National Capital Planning Commission made the key finding that granting the easement would not create an adverse environmental impact, and it therefore gave its approval on July 7, 2011 (Exhibit 44). Finally, an Easement Agreement must be executed. [The final version of the Easement Agreement has been filed (Exhibit 43(a)), and Applicant's counsel agreed to add a binding element requiring Applicant to execute it prior to site plan approval, and to carry out its terms. Tr. 111. That promise became Binding Element 7].

3. William Landfair (Tr. 231-264; 281-283):

William Landfair testified as an expert in land planning. Mr. Landfair proposed to define the surrounding area with boundaries which are slightly different than those proposed by Technical Staff, as shown by a yellow line on Exhibit 40 (not reproduced here). Mr. Landfair's defined area extends somewhat further to the north than Technical Staff's, including more of the mixed commercial/residential area between Westbard Avenue and River Road. Mr. Landfair indicated that these differences were not that significant and that he could accept either definition. Tr. 236.

Mr. Landfair described the character of the surrounding area as "quite diverse." Tr. 236. As Mr. Landfair explained (Tr. 237):

... looking further to the west, across the Capital Crescent Trail, where you have the Westbard commercial area, you have quite a few different types of land uses, a mixture of retail, office, and residential uses in the C-1, C-0, I-1 and R-10 zones.

To the north, of course, along Butler Road, you have a mixture of industrial and commercial uses in the I-1 zone. To the east and to the south you have park land, and of course, further to the east you have the single family homes in the R-60 zone.

And further to the southwest, again across the Capital Crescent Trail, you have townhouses in the RT-12.5 zone.

Mr. Landfair also used a comparative density exhibit prepared by Technical Staff (Exhibit 53) to support his opinion that the proposed development would be compatible with its surroundings. He

noted that the proposed development would have a total density of 16.7 units to the acre, while the residential densities transition from the higher densities further to the west, to the lower single-family densities to the east. A multi-family building, which is located in Westbard , has an approximate density of 137 dwelling units to the acre, while a nearby townhouse community further to the south has a density of just under 13 dwelling units to the acre. The single family residential neighborhood to the east has a density just under five dwelling units to the acre. In his opinion, given these surrounding densities, as well as the proximity of commercial and industrial uses nearby, the proposed density of 16.8 dwelling units to the acre will provide an appropriate transition.¹² Tr. 238-241.

Mr. Landfair then compared the proposed use to two other RT zoning plans which have been approved in the County for RT-15, zoning cases G-786, otherwise known as Plyers Mill, and G-798, which was the Good Counsel High School site in Wheaton. In both cases, the master plan did not recommend a specific density for the RT zone. Both cases are surrounded on at least three sides by residential zoning. In the case of Plyers Mill, there are also some nearby institutional uses and nearby RT-12.5 townhouse project. In the case of Good Counsel, there were some adjacent commercial land uses.

Both ended up being rezoned to the RT-15 zone, approved for 15 units per acre. Both were found to be compatible with the adjacent single family residential, the adjacent institutional and commercial. Moreover, the binding elements in this case contribute to the compatibility of a rezoning.

Mr. Landfair further testified that the proposed development would be consistent with the Westbard Sector Plan and the Montgomery County Zoning Ordinance. He noted that specific compliance with recommendations of the master plan or sector plan is not a requirement for

¹² The Hearing Examiner notes that 30 dwelling units on 1.8121 acres results in a density of 16.56 dwelling units per acre.

reclassification to an RT zone. In this case, there are specific recommendations regarding the redevelopment of this property. The Sector Plan recommended RT-10, but the proposed reclassification of the property from I-1 to RT-15 is, in his opinion, more appropriate in this case. Mr. Landfair feels that the proposed zoning is substantially consistent with the Sector Plan recommendations.

The Sector Plan indicated that the site would be appropriate for townhouses. Given the site's proximity to Bethesda and Friendship Heights, and given the changes in land planning that have taken place since the original approval of the plan in 1982, he believes this specific category of RT-15 is appropriate. At the time the plan was written, the so-called urban row home on compact sites was not a common building type, particularly in places like Montgomery County. The concept of developing more compact and more sustainable communities in close-in locations was not the prevailing approach. In fact, the RT-15 zone did not even exist at the time of the Sector Plan's adoption. It was added later in recognition of the changes in urban design and land use concepts. Since the adoption of the sector plan, the Westbard area has become more urban in character, taking advantage of the development of transit oriented urban destinations in Bethesda and Friendship Heights. The property is adjacent to and will have access from the Capital Crescent Trail. In fact, this trail used to be a railroad serving nearby industrial uses. But now it is a major recreational corridor allowing residents to walk, run, and bicycle into Bethesda. Tr. 242-245.

In addition The RT-15 zone permits a more appropriate density than that allowed by the RT-10 zone, or for that matter the RT-12.5, which is more suburban in character and requires greater open space and setbacks. Given the orientation of the property, surrounded on three sides by park land, the large setbacks of the other RT zones are simply not needed. Given the size of the property, the RT-10 zone would only yield 18 units, and not require any MPDUs. The RT-15 proposal is providing five MPDUs, which is a large public benefit in an area where there are relatively few

MPDUs. Tr. 245.

Finally, the existing use on the site qualifies as a brownfield site, and while remediation of a brownfield site is a significant public benefit, it does come at substantial cost, and the higher density of the RT-15 zone is necessary to make this project economically feasible, and it will result in increase in the pervious area from what is now approximately 6.7 percent to 34 percent, which is also a public benefit. Tr. 245-246.

While there is language in the Sector Plan which talks about reinforcing the use of land for beneficial, industrial use, Mr. Landfair believes the merits of this rezoning, including providing improved compatibility and a better transition with the surrounding area, outweighs maintaining the existing I-1 zone. Tr. 245.

Mr. Landfair reviewed the purpose clause of the RT-15 Zone, and concluded that the proposed development would satisfy all three alternative criteria. It is designated in the Sector Plan, appropriate at the density proposed and would serve as a buffer or transitional use between commercial, industrial, or high density apartment uses, and low density one-family uses. Tr. 246-248.

Zoning Ordinance §59-C-1.722 outlines requirements for row design for an RT project. Here it is proposed to have one row with nine units, instead of the permitted eight. However, there is a waiver provision from section 59-C-1.74(d)(2) which allows a row of more than eight units in those cases where the MPDU bonus density is being requested, which is the case here. Applicant will also be seeking a waiver of the two-foot offset requirement, although Mr. Landfair feels that it has less to do with the MPDUs and more to do simply with good design for this particular project, since the two-foot setback is a design element that is more typically found with suburban townhouses. These are proposed to be more like city homes, and the two-foot setback is not needed to create good design. Tr. 248-249.

Mr. Landfair further testified that the proposed development complies with all the other development standards in the RT-15 Zone, except that the building setback from any detached dwelling lot or land classified in the single family detached zone needs to be a minimum of 30 feet, and Applicant plans a 20 foot setback. However, the zoning ordinance does permit the setbacks to be reduced if a more desirable form of development can be demonstrated at site plan, and that's what Applicant plans. Tr. 251,

Mr. Landfair opined that the proposed townhouse development, at RT-15 density, will be compatible with the surrounding area, which has a very diverse mix of uses, not just the single family residential uses further to the east, but also multi-family and retail, industrial and office uses to the north and to the west. He believes that this plan will provide a compatible transition between those uses. Further, he feels that townhouses are inherently compatible with other single family uses. They are allowed in all single family zones per MPDU options and cluster methods. Townhouses reflect the so called old urbanism that's found in established communities like Georgetown and Capitol Hill, and it's also key to new urbanism, such as that found in Kentlands, King Farm, Fallsgrrove and Clarksburg. Finally, the specific design features, notably the binding elements that have been agreed to, will help to ensure maximum compatibility. Tr. 251-252.

Mr. Landfair opined that the site is adequately served by Fire and Rescue and Police. Bethesda Company 6 is about one and three-quarter miles to the north. Bethesda district station is about two and a quarter miles, also further to the north. Montgomery County Public Schools in a letter to the Planning Board, attached to the technical staff report, estimates that this development will generate approximately eight elementary students, four middle school students, and four high school students. Currently, enrollments at the Westbrook Elementary, Westland Middle, and BCC are over capacity. So a school facilities payment will be required to obtain preliminary plan approval. Tr. 253-254.

Mr. Landfair also opined that this proposal is in the public interest. In determining the public interest, the District Council will look at the master plan conformity, the Planning Board and Planning Board staff recommendations, the impact on public facilities, the environment, as well as public policy goals. He believes this proposal meets all of those criteria and is a fine example of smart growth. Moreover, the replacement of this industrial use and brownfield site with a residential use while increasing the perviousness from 6.7 percent to 34 percent, is clearly in the public interest. The storm water management that will be proposed, which will be environmentally sensitive design to the maximum extent practical, will also be clearly in the public interest. This plan will add more green area and tree canopy. It will also provide affordable housing with these MPDUs. The Planning Board staff and the Planning Board recommend approval of this project, and the development is sensitive and compatible with the surrounding area. In sum it is in the public interest. Tr. 254-255.

[Applicant's attorney interjected that there was a possibility that if the school was operating at over 120 percent of its capacity, that the area could go into moratorium, and in the last Council session, there was money put into the capital program such that this area didn't go into moratorium. It stayed below the 120 percent, and hence a facilities payment is required at all three levels. Tr. 256]

On cross-examination, Mr. Landfair added that based on his experience as a land planner, the proposed development near to the Capital Crescent Trail, with access by bicyclists and pedestrians, would reduce vehicle trips. The sheer proximity to the trail, the convenience of the access to the trail, the access and location which is convenient then to Little Falls Parkway and to park users, will cut down on vehicle traffic in the immediate area. Moreover, the current use has noxious impacts with dust, noise and the truck traffic that it generates. That type of use, which is a grandfathered use in the I-1 zone, would not be allowed today if they were to start up operations. It is there by virtue of the fact that the property was previously a different industrial zone. If this use continued, it would continue also to have an adverse impact on the surrounding area. Tr. 257-258.

Mr. Landfair also admitted that financial feasibility of a project to a developer is not a criterion for rezoning and that in the other rezoning cases he mentioned, the Master Plan had not recommended a specific RT designation, but in this case RT-10 was recommended. Tr. 258-259. He modified his testimony about buffering to say that the proposed use would not be much of a buffer for the single-family homes because the commercial uses to the west would not be visible to them anyway based on the changes in elevation. Nevertheless, it is still transitional, going from commercial to townhouse to single family. Tr. 263-264.

On rebuttal, Mr. Landfair testified that the development standards in the I-1 zone are not conducive to compatibility as much as an RT-15 zone would be in this case, either with the adjacent park land or with the nearby single family residential neighborhood. On page 98 of the Sector Plan it talks about major issues of major environmental concern within the Westbard sector area. This proposed development in the RT-15 zone would be more compatible from a noise perspective. Without truck traffic, there will not be the noise generated from this use that would occur from any number of industrial uses. Clearly with the storm water management practices that are proposed for this development, there will be better flood control and less stream pollution. Finally, the encroachment into the stream valley ecosystem will be reduced with this proposed development. Thus, the proposed development would be more compatible when compared to any number of uses in the industrial zone. Tr. 282-283.

4. Charles Irish (Tr. 300-318; 330-332):

Charles Irish testified as an expert in civil engineering. He conducted surveys on the property including boundary, topographic, as well as the natural resources and forest delineation. He also prepared conceptual plans for development and subsequently the site portion of the rezoning application, which included the schematic development plan, the surrounding area plan, the ID plat, the fire access plan, green space plan, and circulation plan. He is very familiar with the area, which

he described. He noted that the stream for Willard Branch parallels the southeast boundary line of the site, beginning at the northeast corner, and then runs in a concrete channel until almost the southern corner of the property, and then it transitions into a more natural stream. The entire western boundary is wooded park land.

The runoff from the site, sheet flows from the rain, comes down from the buildings and onto the pavement, and flows down into the stream channel. There does not appear to be any storm water management whatsoever on the site, or even a storm drain. It is over 93 percent, almost 94 percent impervious currently, and that's not even counting the almost 10,000 square feet of encroachment into the parkland. The proposed development would be about 66% impervious. Building coverage would be approximately 31 percent. Tr. 304-307.

Mr. Irish reviewed the storm water management concept plan which will be submitted in connection with subdivision. While state law would require using environmental site design to the maximum extent practicable on at least 50 percent of the site area since it is a redevelopment site, under Montgomery County law, Applicant is required to treat 100 percent of the impervious areas on the site to the maximum extent practicable using environmental site design. Mr. Irish is in the process of preparing a plan that will treat most of the site runoff with environmental site design measures. However, if Maryland's Department of the Environment (MDE) or the County do not want infiltration because of potential contaminants, then Applicant would be precluded from most of the environmental site design measures. Absent a concern with the soil quality, Applicant should be able to treat most of the site with environmental site design measures, and a portion that couldn't be so treated would either be treated structurally or alternatives would apply which might create some more room for on-site parking. Tr. 307-310.

Mr. Irish, while noting that he is not an environmental engineer or specialist with respect to contaminants, stated that Applicant is handling the issue of contaminants through the Maryland

Department of Environment. Nothing can be done on the site until Applicant gets “a clean bill of health from them with respect to our plan.” Tr. 310.

Mr. Irish further testified that if Applicant did nothing with respect to stormwater management, other than build this site, decrease the imperviousness from 94 percent to 64 percent and add the buffer plantings, that in and of itself would be a major improvement. Added to that, Applicant is going to treat the other runoff from the site as well. Based on his experience, he has no doubt that Applicant can meet the appropriate standards for stormwater management. Tr. 311-312.

According to Mr. Irish, water, sewer, gas, and other utilities are available at capacities adequate to serve the proposed development. This site is currently served by all utilities. An eight inch water main exists in Butler Road and literally abuts the subject property. There's a major sewer line that abuts the property in that area that crosses the creek and continues southerly. WSSC in their response to the submittal indicated that both would be adequate to serve. The property is currently served by gas, as well as electric, and those capacities would be adequate for the project. Tr. 312-313.

In Mr. Irish's opinion, there will be no adverse impact on the surrounding area, in terms of the civil engineering aspects of the project. Tr. 313.

The site is currently accessed by the extension of Butler Road in the northeast corner of the property. There is an access easement from that point to the end of the dedicated portion of Butler Road which is about 150 feet north of the property. That access would remain, as the commercial vehicle access, because those vehicles are prohibited from Little Falls Parkway. The access point on Little Falls Parkway is shown opposite the northeast corner of the site, Applicant's preferred location. He has examined other locations along Little Falls Parkway, as well, and the sight distance works in all locations. In Mr. Irish's opinion, access through these locations will be safe, adequate, and efficient. Tr. 314-315.

Internal circulation is fairly simple. The residents will come in off of Little Falls Parkway, turn to the south, through a driveway, and then go to a T intersection to get to their homes. The width of the drive, a private road, is at least 20 feet in all locations, so that it meets fire access standards. The Turning radius works as well. It will be safe for pedestrian and vehicular traffic. There are no sidewalks in front of the individual units, but a four-foot wide strip that would essentially be a transition from the 20-foot official private road to the private driveways, to pick up grade. Tr. 315-316. There will be a sidewalk on the vehicular bridge that connects Little Falls Parkway to the development, and that sidewalk will continue on to connect with the Capital Crescent Trail. Tr. 331-332.

Mr. Irish further testified that the property has no forest on it, and so there is a 15% afforestation requirement for the site, and Applicant would attempt to meet that on site. That plan will be submitted in conjunction with the preliminary plan and site plan, which would be a combined submittal to Park and Planning. Tr. 317.

5. Chris Kabatt (Tr. 318-330; 333-336):

Chris Kabatt testified as an expert in traffic engineering and transportation planning. The primary vehicular access for the residents would be from Little Falls Parkway, and commercial vehicles would have to enter the community via the secondary driveway on Butler Road, since trucks are not permitted on Little Falls Parkway.

Mr. Kabatt described the surrounding roads and the available transit system. Little Falls Parkway, on the eastern side of this site, is a two-lane road between River Road and Massachusetts Avenue, with a 35 mile an hour posted speed limit. Little Falls Parkway widens at both River Road and Massachusetts Avenue to provide auxiliary turn lanes.

Metrobus operates the T-2 line along River Road, and that operates between Rockville Metro station and the Friendship Heights Metro station, seven days a week. There is also the Ride-On 29

line on River Road that operates seven days a week between the Bethesda Metro station, Glen Echo, and the Friendship Heights Metro station. There are stops for both of these lines at the Butler Road intersection with River Road which is less than a quarter of a mile from the proposed townhouses.

The Capital Crescent Trail provides a route for bicyclists, walkers, roller-bladers and other non-auto users from the Bethesda CBD down to Georgetown. There's an at grade connection to the trail on the north side of River Road, and Applicant proposes to provide a connection to the trail. Tr. 321-322.

Mr. Kabatt prepared a traffic statement for the application in accordance with M-NCPPC rules and regulations. Based on the size of the proposed plan, 30 dwelling units, the local area transportation review guidelines require Applicant to prepare a traffic statement as opposed to a full blown local area transportation review traffic study. Mr. Kabatt's updated traffic statement was introduced as Exhibit 59. He concluded, based on the trip generation and the size of the project, the proposed use will not have a significant impact on the surrounding area, and it is therefore suitable for the subject property. Tr. 323-324.

Per the LATR and PAMR guidelines, the 30 residential townhouse unit development is not of significant size, and the proposed plan will generate fewer than 30 peak hour trips, 14 trips during the a.m. peak hour and 25 trips during the p.m. peak hour. Mr. Kabatt opined that the surrounding road network will adequately accommodate the proposed development.

Those 25 p.m. peak hour trips generated by the townhouses would displace trips that are already generated by the existing BETCO site. At the time the application was filed, the PAMR requirement for the Bethesda-Chevy Chase policy area was 30 percent. Based on the number of new trips generated by the proposed residential use, seven trips are required to be mitigated. The Applicant proposes to make the appropriate identified improvements, or make the appropriate payment, currently valued at \$11,300 per trip, to meet the PAMR requirement. Tr. 324.

Mr. Kabatt described the functioning of the two access points. He noted that there is a binding element that Applicant will limit commercial vehicles access to Butler Road. In addition to signage, there are ways to design the road to do that, which will also discourage cut-through traffic; however, Mr. Kabatt did not view this route, the cutting through the townhouse driveway to Butler Road, as being a huge cut-through point for commuters. Traffic today turns on streets earlier, such as Ridgefield and makes its way to Westbard and then down to Massachusetts. That would continue to happen. The proximity of Butler Road to Little Falls Parkway doesn't provide that much of a time savings. Tr. 325-327.

Mr. Kabatt noted that the Montgomery County Department of Transportation's letter indicated that the site access and the details for the site access would be determined through the subdivision process, but they did not object to the rezoning. In Mr. Kabatt's professional opinion, the vehicular access be safe, adequate, and efficient, and will be adequately served by public roads. Tr. 327-329.

B. Community Members In Support

1. Dan Dozier, on behalf of the Little Falls Watershed Alliance (LFWA) (Tr. 115-133):

Dan Dozier testified that he is co-president of the Little Falls Watershed Alliance (LFWA), a volunteer organization. The Little Falls Watershed Alliance was started in 2008 with the express purpose of advocating to protect the Little Falls watershed and the fragile natural environment in lower Montgomery County, and in the D.C. portion of the watershed to ensure that the natural spaces persist for generations, and that the water quality is improved. There are over 20 neighborhoods in the watershed, which includes the Little Falls Creek, the Willet Creek and the Minihana Creek and their branches. LFWA is composed strictly of local citizens striving to bring their neighbors together to build awareness, improve natural habitat, protect the community's natural heritage, and enhance the community's enjoyment of the many creeks and forests in the watershed. LFWA speaks for the needs of parks and natural areas, and advocates for clean water and laws enforced consistently and fairly.

According to Mr. Dozier, the Little Falls Watershed, is classified by the County Department of Environmental Protection as one of the most impaired watersheds in the County. It is located in a very urban developed area, most of that development having occurred 40 and 50 years ago, before the environmental regulators understood the impact that urban development has on water quality. Much of the watershed and the creeks are contained in artificial pipes that were installed when development occurred. Those pipes have very adverse effects on the water quality, in terms of stream flow, speed, heat and picking up urban runoff.

In Mr. Dozier's words, "The current industrial use on this property [*i.e.*, the subject site] . . . has been and is an environmental disaster. . . . This use is totally inappropriate located where it is, located next to the creek. It's an example of the type of urban development that's had such an adverse impact on our watershed." Tr. 118.

When asked by the Hearing Examiner whether he favors this rezoning, he stated, "Yes, sir. Absolutely." Tr. 118. He added (Tr. 118-119),

The reason, the paving on that creek leads to significant sediment contamination that flows right off. The rain falls on that pad, and flows right into the creek, which is right next to it, carrying the sediment. And there's a great deal of sediment that gets located on that concrete pad because of the brick and block that's being shipped in and out. Plus, the contamination from the trucks that come in there, and that gets washed off, the grease and the oil that leak [into] the creek.

Mr. Dozier recognizes that there was a lot of controversy about the easement across the creek to access Little Falls Parkway, but "from our perspective, this development is better for the environment than the current use. Period." Tr. 121. He stated that "Removing that concrete pad and having the property subject to the new storm water regulations will improve water quality in the area, in the most important and most sensitive area of the creek to aquatic creatures." Tr. 122. Okay.

Mr. Dozier noted that he lives in Green Acres, at the corner of Little Falls, Greenway Road and Yorktown Road, across Little Falls Parkway from the site, in the neighborhood most directly impacted by this development. [Bill Landfair, Applicant's land planner, estimated the distance to his

home at about 400 feet.] Mr. Dozier stated that while some people in the neighborhood may oppose the development, “everybody would be very pleased for that truck noise to go away, and for better buffering between our neighborhood and the new property, the new use.” Tr. 123. The trucks come in and start loading and unloading bricks and blocks at about 3:00-4:00 in the morning.

Mr. Dozier indicated that as storm water management improves under the new State and County regulations, citizen enjoyment and use of the park will increase because it will slow stream flow into the park, reducing stream bank erosion. “This would be a win-win for both the citizens and the environment. So these are the reasons we support changing the current use of the [BETCO] property from industrial to residential. We strongly support upgrading this land use to residential, and require the new development to meet the County's storm water regs. These changes would be very positive, and definitely improve the environment in our stressed and degraded watershed.” Tr. 124-125.

Mr. Dozier is also satisfied with the binding elements that call for Applicant to remove and clean up paving and debris from the site and to implement projects which may include stream restoration and other environmental projects. [This language had been contained in Binding Elements 10 and 11 when he testified, but the same language is now in Binding Elements 11 and 12.]

Mr. Dozier stated that there are many trucks going in and out of the BETCO site daily because it is now used as a transshipping facility, and their activity creates a lot of dust and noise. Tr. 131-132.

2. Ann McDonald, on behalf of the Citizens Coordinating Committee on Friendship Heights (CCCFH) (Tr. 133-153):

Ann McDonald testified that she is the vice-chair of the Citizens Coordinating Committee on Friendship Heights (CCCFH), which represents 16 citizens associations with approximately 4500 households and members. Its member communities cover a large area along River Road, from Western Avenue west out to Kenwood and Springfield, and on the north/south access, from

Massachusetts Avenue to Wisconsin Avenue. That area includes Westbard where the EYA proposes to build the new townhouse development.

Ms. McDonald testified that CCCFH is very pleased that EYA has agreed to its list of binding elements, but the remaining issue is the need for more parking in the townhouse development. The streets will be too narrow for any on street parking, and CCCFH fears that the proposed on-site parking will be insufficient.

She believes the MPDU families will probably have at least two cars for two employed adults going to their separate jobs. If they have high school or college age kids, they may have to have a third car to drive to school and drive to jobs. So the development's eight extra spaces are very likely to be taken up by the extra cars of the MPDU units.

Ms. McDonald noted that, if just five out of the 25 market rate homes invited four guests for dinner in the same evening, their driveways could accommodate only 10 of the 20 visitor cars. Other events with visitors may create even more of a parking overflow problem. There is no other parking available nearby because there is rarely if ever a space available on Butler Road, and CCCFH is worried about environmental damage that could be done to the adjacent parkland if overflow vehicles seeking parking end up illegally parked there in spite of parking restriction signs.

Although CCCFH realizes that the Planning Board will look at the parking issue at site plan, they wanted to also bring it up now because they feel strongly about it. CCCFH feels that there should be at least 15 extra parking spaces on site, not just 8, as currently planned.

Ms. McDonald identified photographs in Exhibit 47, which depict River Road, Little Falls Parkway and Butler Road.

When pressed for CCCFH's "bottom line" on the rezoning, Ms. McDonald testified that the organization would favor the rezoning with the agreed-to binding elements, even if the on-site parking is not increased. Tr. 150-152. [CCCFH's attorney, Norman Knopf, interjected that CCCFH's

position is that the development would not be compatible unless more parking is provided. When the Hearing Examiner pointed out that his position was inconsistent with his witness, Ms. McDonald stated that she speaks on behalf of the organization, as its elected officer. Tr. 151.]

3. Peter Salinger, on behalf of the Citizens Coordinating Committee on Friendship Heights (CCCFH) (Tr. 285-299):

Peter Salinger testified that he is on the board of directors of the Springfield Civic Association and is the chair of its zoning committee. Springfield Civic Association is a member of the CCCFH, and although he is not an officer in CCCFH, he was appointed by that organization to testify on its behalf at the hearing.

Mr. Salinger indicated that he had taken the photos of Butler Road and River Road included in Exhibit 47. He described the heavy traffic depicted on River Road, which backs up at the light at Little Falls Parkway. Mr. Salinger is concerned that the proposed connection of the development to Little Falls Parkway will lead cut-through traffic, south on Butler and onto Little Falls Parkway, by people trying to avoid the light. He is satisfied with binding elements that will limit truck traffic to the Butler Road access.

Mr. Salinger further testified that more parking is needed on site in the proposed townhouse community, and Butler Road is not an answer for this problem. Mr. Salinger, supported by CCCFH's attorney and differing from Ms. McDonald, testified that CCCFH's support was premised upon EYA resolving the parking concerns. CCCFH found this a positive project if the parking issue is resolved, but it did not vote on what position to take if it was not resolved. Tr. 291-293.

C. Community Members In Opposition

1. Jim Humphrey, on behalf of the Montgomery County Civic Federation (MCCF) (Tr. 265- 281):

Jim Humphrey testified on behalf of the Montgomery County Civic Federation (MCCF), which opposed the rezoning and the driveway access across parkland which the Planning Board has already approved.

A primary concern of the Federation is over the loss of scarce industrially zoned land in the County, a position which MCCF has taken in other contexts, as well. Mr. Humphrey quoted from page 32 of the 1982 Westbard Sector Plan, “The Plan recognizes the original and continuing character of Westbard as commercial/industrial and seeks to reinforce this character because of the substantial benefit that it provides to businesses and residents of lower Montgomery County.” This point is repeated in a bullet point on page 35 of the Plan.

The Plan goes on to state in its initial land use section, “Without the necessary goods and services in a handy location, commercial trucks and residents’ passenger vehicles would have to travel to similar areas some distance away for services now provided in Westbard. The only other nearby industrial land was zoned out of the Bethesda CBD in 1977 as a result of that Sector Plan.”

MCCF’s conclusion was that retention of the I-1 zone for the whole property, even though it is only 1.81 acres in size, would be recommended, and that rezoning it would be a significant loss to the County’s portfolio of industrial zoned land.

Mr. Humphrey noted that there are thousands of acres of residentially zoned land in down County within the beltway, but there is a real scarcity of industrial zoned land, so the loss of even this substantial two-acre or almost two-acre parcel would be significant. Tr. 268-270.

The Sector Plan recommended rezoning to I-1, and then either the plant could be retained or it could be converted to office, warehouse, light manufacturing, or similar use. So retention of the industrial zoning on the property is separate from the current use and impact that it has on the adjacent park land. When questioned by the Hearing Examiner as to whether MCCF’s recommendation was consistent with the Sector Plan’s recommendation of the RT Zone for this site, Mr. Humphrey replied that “[t]he plan is very schizophrenic” in that respect since it also recommended rezoning to I-1 and possible other industrial uses under I-1. Tr. 271-272.

Mr. Humphrey testified that MCCF also felt that placing a residential development on this site perpetuated the undesirable planning practice of interspersing more multi-family residential with industrial use, and thus the development would be incompatible with the surrounding area. Tr. 275.

Finally, Mr. Humphrey indicated that because the RT-15 Zone did not have a limit on the percentage of building coverage of the tract, it would not prevent detrimental effect on the parkland further east. Tr. 277. Moreover, in his opinion, the loss of industrial zoned land is not promotion of the welfare of the inhabitants of the County. Tr. 279.

2. Robert Dyer (Tr. 24-62):

The only other opposition came from Robert Dyer, a citizen who described himself as “a lifelong resident of the Westbard area,” but who lives on Albia Road, in the Springfield Subdivision, [about a half a mile away from the site,¹³ outside the defined surrounding area]. Tr. 24 and 61-62. Mr. Dyer’s main complaint is that the Planning Board allegedly approved the easement over parkland (allowing the project to access Little Falls Parkway) before the public was fully aware of that proposal. Tr. 27-28.

According to Mr. Dyer, the Planning Board held a closed session in December of 2010 at which the proposed easement was discussed. It was then approved at a session open to the public in January of 2011. He first learned about it in May, after it was already approved, and he therefore feels that “we haven’t yet had a chance, as citizens, to comment about our parkland being taken and given to a private developer.” Tr. 28-30. Nevertheless, Mr. Dyer admits that he testified regarding the easement before the National Capital Planning Commission “where . . . the easement part was made official.” Tr. 34. On cross-examination, Mr. Dyer indicated that he testified before the Planning Board on June 16, 2011, regarding the easement agreement, before the National Capital

¹³ Applicant’s land planner estimated the distance from Mr. Dyer’s home to the site as about 1200 feet (Tr. 62), but the actual location of the home was off of the exhibit being used (Exhibit 40) so the estimate understated the distance. The Hearing Examiner takes official notice from Google maps of the area that the distance is about a half a mile.

Planning Commission on July 7, 2011, also regarding the easement agreement, and again before the Planning Board on July 14, 2011, relating to the rezoning. On the other hand, Mr. Dyer says he was not permitted at any proceeding to challenge the easement itself, only the language of the easement agreement. Tr. 57-59.

Mr. Dyer also feels that the Sector Plan's recommendation of an RT Zone on this site, as long as there is access to Little Falls Parkway, is inconsistent with the tenor of the Sector Plan, which raises many concerns about inadequate access for vehicles into the industrial zone. Tr. 30-33.

Mr. Dyer also feels that the project would not be compatible or in the public interest because it would intrude into parkland which is scarce in his area. Tr. 35-36. As he stated (Tr. 36):

. . . And so the only green space you find in the area is Little Falls Stream Valley Park, which Little Falls Parkway goes through and . . . the parkway on this section is entirely controlled access. It's a natural environment. And so when this is brought in, you now have an ugly intrusion. . . .

Mr. Dyer feels that the existing BETCO plant is not as visible from Little Falls Parkway as Applicant has portrayed it. He emphasized that his opposition is not to a residential development on the site, *per se*, but to the Little Falls Parkway access. Given that, he opposes the development. He also feels that the improvements to be made to the Willet's Branch Creek as part of the Easement agreement will not eliminate all the pollution. In addition, the access to Little Falls Parkway will result in people jaywalking across Little Falls Parkway, and creating traffic hazards Tr. 37-41.

Mr. Dyer suggested that Butler Road could be used as the access to the proposed community, eliminating the need for the easement accessing Little Falls Parkway. Tr. 43-44. He challenged the assertion of compatibility because the closest residential areas are not as close to the site as the industrial/commercial areas. One Butler Road company has auto racks that are several stories high which will be visible from the proposed townhouses, and people living on this site will have to deal with the sounds, the smells and the sights of these auto facilities. Tr. 44-45.

Mr. Dyer also raised the question of the impact of the brownfield that must be addressed. He

testified that the problem originated from an underground fuel spill that occurred on Butler Road at a former fuel transfer facility, which left toxic “MTBEs”¹⁴ that have now been found on the Hoyt property. He is concerned about allowing this development because the land disturbance may result in the MTBEs leaking into the underground water supply. Tr. 50-52. When asked by the Hearing Examiner whether he had some evidence that the excavation could not be done safely, Mr. Dyer indicated that he did not. Tr. 53.

D. Community Members Neither in Support Nor Opposition

Jenny Sue Dunner, on behalf of the Coalition for the Capital Crescent Trail (CCCT) (Tr. 220-230):

Jenny Sue Dunner testified on behalf of the Coalition for the Capital Crescent Trail (CCCT). CCCT was organized in 1986 to monitor the shared use trail that goes from Georgetown to Silver Spring. The mission of the CCCT Board regarding the trail is to protect it, maintain it and develop it to a truly first class trail. She described the works of CCCT. The trail has over 1 million users a year, and as a result, it can get very crowded with walkers and bikers and strollers and people walking dogs.

Ms. Dunner noted that the proposed access point to the trail would be extremely steep. It's going to probably require a landing, because of the height and because room will be needed so that those using the access don't immediately come out onto the trail with bikers going by very quickly. She also mentioned that CCCT had voted a couple of years ago to spend \$75,000 to develop a park called the River Road Plaza, which is going to be where the bridge is that goes over River Road, across from McDonalds.

Ms. Dunner stated that one of the nice things about the proposed development on the subject site is that people will not have to take a car to go to downtown Bethesda [presumably because they could walk or bike there on the Capital Crescent Trail]. That would take cars off the road.

¹⁴ The Hearing Examiner takes official notice that the term “MTBE” stands for Methyl Tertiary Butyl Ether, a fuel additive in motor gasoline, according to the website of the U.S. Environmental Protection Agency, www.epa.gov.

Ms. Dunner added that CCCT hoped that the money collected for the PAMR payment would be used for aiding improvements to the Capital Crescent Trail in the vicinity. [The SDP contains a non-binding element in which Applicant agrees to cooperate with CCCT in urging the appropriate government agencies to use the PAMR payments for that purpose.]

When asked by the Hearing Examiner whether CCCT was supportive of this rezoning application or not, Ms. Dunner replied that CCCT does not usually vote on land use applications, and therefore does not endorse anything, one way or the other. Tr. 229-230.

V. ZONING ISSUES

Zoning involves two basic types of classifications, Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967). The Council must also find that the rezoning will be in the public interest as part of the coordinated and systematic development of the regional district, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

Montgomery County has many floating zones, including the R-T Zones. The RT-15 Zone contains development standards and a post-zoning review process that generally delegate to the Planning Board the details of site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a rezoning.

As mentioned in Part III.G. of this report (pp. 24-28), compliance with Sector Plan recommendations is not mandatory in this case because the R-T Zones do not require it; rather, the courts have held that the Master Plan or Sector Plan should be treated only as a guide in rezoning cases like this one. As stated in *Trail v. Terrapin Run*, 403 Md. 523, 527, 943 A.2d 1192, 1195 (2008),

We also acknowledge our statement in *Mayor and Council of Rockville v. Rylins Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002) (citing *Richmarr*, 117 Md. App. at 635-51, 701 A.2d at 893-901, [1997] that:

We repeatedly have noted that [master] plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning. Where the latter exist, however, they serve to elevate the status of comprehensive plans to the level of true regulatory device.¹⁵

We return now to the three areas of Council review discussed above – the purpose and requirements of the zone, compatibility with land uses in the surrounding area, and relationship to the public interest.

A. The Purpose and Requirements of the Zone

The intent and purpose of the R-T Zones, as stated in Zoning Ordinance §59-C-1.721, are set forth below.

¹⁵ Because the proposed RT-15 Zone does not require conformance with the Sector Plan, this case is not affected by legislation aimed at modifying *Terrapin Run*'s interpretation of the word, "conform."

The purpose of the R-T Zone is to provide suitable sites for townhouses:

- (a) In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or*
- (b) In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.

As is evident from the statutory language, the R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses.

As discussed in Part III. G. of this report, the Westbard Sector Plan, at p. 52, recommended that the site be reclassified from I-2 to I-1 to reduce the industrial impact on the parkland and the neighbors, but it also specified that the site would be appropriate for townhouse development in the RT-10 Zone, if access to Little Falls Parkway could be achieved. On the other hand, it did not specifically designate the subject site for the RT-15 Zone, and thus the Purpose Clause arguably cannot be satisfied under the designation criterion.¹⁶ However, there are three alternative methods of

¹⁶ Applicant argues that its proposal does satisfy the “designated” prong of the statutory test because the Sector Plan recommends a townhouse development, and the RT-15 Zone did not exist in 1982 when the Sector Plan was adopted. Tr. 246-248. Technical Staff agreed with Applicant for the same reasons. Exhibit 30, pp. 1, 12 and 14. While this

satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them. Accordingly, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones*” or in areas “*where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*”

The evidence in this case supports Applicant’s contention that the subject site satisfies both the “appropriateness” and the “transitional” criteria. In this regard, Applicant’s land use planner, William Landfair, testified that the development is appropriate at this location for a number of reasons. First of all, the Sector Plan indicated that the site would be appropriate for townhouses. Although the Sector Plan recommended the RT-10 density, Mr. Landfair opined that the specific category of RT-15 is more appropriate, given the site's proximity to Bethesda and Friendship Heights, and given the changes in land planning that have taken place since the original approval of the Sector Plan in 1982. Tr. 243-244.

At the time the Sector Plan was written, the urban row home on compact sites was not a common building type, particularly in places like Montgomery County, and the concept of developing more compact and more sustainable communities in close-in locations was not the prevailing approach. In fact, the RT-15 Zone did not even exist at the time of the Sector Plan's adoption. It was added later in recognition of the changes in urban design and land use concepts. Since the adoption of the sector plan, the Westbard area has become more urban in character, taking advantage of the development of transit oriented urban destinations in Bethesda and Friendship

interpretation is arguable because the language of the statute could be read as applying the term “designated” to any “*residential development at densities allowed in the R-T Zones,*” not just to the specific density mentioned in the Sector Plan, the Hearing Examiner feels that a better interpretation of the term “designated” is that it is referring to the particular RT-Zone density recommended, while the term “appropriate” is referring to any of the densities allowed in the RT Zones. Under Applicant’s interpretation, a Master Plan recommending RT-6 could be considered as designating an RT-15 Zone, and that is a wide disparity in potential densities and impacts on the neighbors. As discussed in the above text, this difference in interpretation of an ambiguous statute does not affect the outcome of the case because the statutory test may be satisfied by meeting any one of the three alternative criteria.

Heights. The property is adjacent to and will have access from the Capital Crescent Trail. In fact, this trail used to be a railroad serving nearby industrial uses, but now it is a major recreational corridor allowing residents to walk, run and bicycle into Bethesda. Tr. 242-245.

In addition, the RT-15 zone permits a more appropriate density than that allowed by the RT-10 zone or the RT-12.5 Zone because they are more suburban in character and require greater open space and setbacks. Given the orientation of the property, surrounded on three sides by parkland, the large setbacks of the other RT zones are simply not needed. Given the size of the property, the RT-10 zone would only yield 18 units, and not require any MPDUs. The RT-15 proposal is providing five MPDUs, which is a large public benefit in an area where there are relatively few MPDUs. Tr. 245.

Mr. Landfair further testified that the proposed development would serve as a transitional use between commercial, industrial, or high density apartment uses, and low density one family uses. Tr. 246-248. Mr. Landfair also used a comparative density exhibit prepared by Technical Staff (Exhibit 53, reproduced on the next page) to support his opinion that the proposed development would be transitional, as well as compatible with its surroundings. He noted that the proposed development would have a total density of 16.7 units to the acre, while the residential densities transition from the higher densities further to the west, to the lower single-family densities to the east. A multi-family building, which is located in Westbard, has an approximate density of 137 dwelling units to the acre, while a nearby townhouse community further to the south has a density of just under 13 dwelling units to the acre. The single-family residential neighborhood to the east has a density just under five (5) dwelling units to the acre. In his opinion, given these surrounding densities, as well as the proximity of commercial and industrial uses nearby, the proposed density of 16.7 dwelling units to the acre will provide an appropriate transition.¹⁷ Tr. 238-241.

Technical Staff agreed with Mr. Landfair's analysis. As stated by Technical Staff and shown

¹⁷ The Hearing Examiner notes that 30 dwelling units on 1.8121 acres results in a density of 16.56 dwelling units per acre.

on the following aerial photograph comparing densities (Exhibit 30, pp. 15-16 and Exhibit 53),

The subject property is an appropriate site for townhouse development given its location and proposed density. . . .

In looking at the existing and approved developments in the surrounding area, it is readily apparent that residential densities of the area transition from higher density to the west to lower density one-family residential neighborhoods to the east. West of the subject property, within the Westbard commercial area, an existing multifamily building has a density of 137 dwellings per acre in addition to the numerous commercial venues located in the area. South of the site, an existing townhouse community has a density of 13 dwellings per acre. The one-family detached residential neighborhoods to the east have a density of approximately five dwellings per acre.

The density proposed for the subject property fits within a transitional framework for the area given the surrounding densities. At 16.8 dwellings per acre, the proposed density provides a transition from the high density apartment building, commercial establishments, and industrial facilities to the west to the low density one-family neighborhood to the east. Additional factors, such as the site being in close proximity to multiple amenities, help lead to the conclusion that the proposed density is appropriate for the area. Given the nature of the surrounding area, the proposed townhouse development is appropriate for the subject property.



The Planning Board concurred as well, stating (Exhibit 38, p. 1),

. . . The application also meets the transitional standard, as the property is located between commercial, industrial, and high-density residential uses and one-family detached homes. Lastly, the proposed density is appropriate given the existing residential densities in the area. The redevelopment of the site will clean up a brownfield site that encroaches onto neighboring parkland, provide substantially more open space than exists today, provide a pedestrian/bicyclist connection between Little Falls Parkway and the Capitol Crescent Trail, and add to housing choice in the area. For these reasons, the Planning Board finds the R-T 15 Zone to be appropriate at this location.

Based on this record, the Hearing Examiner finds that the purpose clause of the RT-15 Zone has been satisfied.

The intent clause of the R-T Zones, found in Zoning Ordinance §59-C-1.721, will also be fulfilled. The first part of that clause notes that it is the intent of the R-T Zones “to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone. . . .” That intent is carried out here with a row design that is a bit longer than usually found in order to design a layout that will fit within the available space. The intent clause also seeks “to provide in such developments the amenities normally associated with less dense zoning categories . . .,” which is accomplished here by access to parkland and to the Capital Crescent trail. The clause continues with the goal of providing “the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments” In this development, there will be both market rate units and MPDUs, thus fulfilling the statutory goal. Finally, the intent clause seeks “to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole.” As discussed in Part III. I. of this report, this development will not only prevent detrimental effects on adjacent properties, it will remedy the detriments of the current industrial use and will improve the healthful environment.

In sum, the Hearing Examiner finds that the intent clause of the R-T Zones will be met by the

proposed development.

Having addressed the purpose and intent of the RT-15 Zone, we now turn to the statutory requirements of the Zone. As demonstrated in Part III. F. of this report, Applicant's proposal complies with all of the development standards and special regulations of the RT-15 Zone, save two which the Zoning Ordinance permits to be varied under specified circumstances.

The first is the requirement of Zoning Ordinance §59-C-1.732(a) for a 30-foot setback from land classified in a one-family detached zone. Applicant proposes a 20-foot setback from the neighboring parkland on the east, south and west, which is classified in the R-60 Zone (*i.e.*, a one-family detached zone). As mentioned in Part III. F. of this report, Zoning Ordinance §59-C-1.732(a), Note 1, permits a reduction of the setback if “. . . a more desirable form of development can be demonstrated by the applicant to the satisfaction of the planning board . . .”

Technical Staff recommended approval of the reduced setback (Exhibit 30, p. 10):

. . . A reduction of the setback to 20 feet is recommended for optimum design since the reduced setback allows a site layout where the townhomes are open to the interior of the community and front to the proposed streets. The reduction also is sensible because, although zoned one-family detached, the surrounding land is parkland and is undeveloped.

The Planning Board unanimously recommended approval of the rezoning “for the reasons stated in the Staff Report.” Exhibit 38, p. 1.

The Hearing Examiner agrees, based on the unrefuted evidence at this stage, that the proposed reduction in the setback will cause no harm in this case, and will result in “a more desirable form of development.” However, the final decision on this matter is expressly left to the Planning Board under the language of footnote 1, and the design and layout of the proposed development will be reviewed by the Planning Board at Site Plan.

The second variance from the development standards pertains to the row requirements of Zoning Code §59-C-1.722. That provision specifies that the maximum number of townhouses in a

group is eight; and three continuous, attached townhouses are the maximum number permitted with the same front building line. It also provides that variations in the building line must be at least 2 feet. However, Zoning Ordinance §59-C-1.74(d)(2) provides that the row design requirements of §59-C-1.722 may be waived if necessary to accommodate increased density because of the inclusion of MPDUs. Applicant's General Note #13 indicates that it is seeking to apply this waiver provision to allow one of the rows of townhouses to include nine units (*i.e.*, one over the limit of eight) and to eliminate the two-foot variation every three units. The Technical Staff report supported the waiver regarding the row of nine units, but did not address the two-foot variation issue. Exhibit 30, p. 10.

The evidence at this stage supports the granting of such a waiver of the row requirements, but this kind of design detail is a matter best determined at site plan review by the Planning Board. The Hearing Examiner recommends that the Council note that the Planning Board, at site plan review, may determine it is appropriate to reduce the setback requirements of Zoning Ordinance §59-C-1.732(a), as permitted by footnote one to that section, and to waive the row requirements of Zoning Ordinance §59-C-1.722, as permitted by §59-C-1.74(d)(2)).

In sum, the subject application meets the purpose and requirements of the RT-15 Zone.

B. Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. The Applicant's land planner, William Landfair, opined that the proposed townhouse development, at RT-15 density, will be compatible with the surrounding area, which has a very diverse mix of uses, with single family residential uses to the east, and multi-family, retail, industrial and office uses to the north and the west. He believes that this plan will provide a compatible transition between those uses. Further, he feels that townhouses are inherently compatible with other single-family uses. They are allowed in all single-family zones with MPDU options and cluster methods of development. According to Mr. Landfair, townhouses reflect the "old urbanism"

that's found in established communities like Georgetown and Capitol Hill, and it's also key to new urbanism, such as that found in Kentlands, King Farm, Falls Grove and Clarksburg. Finally, the specific design features, notably the binding elements that have been agreed to, will help to ensure maximum compatibility. Tr. 251-252. Mr. Landfair also used the comparative density exhibit (Exhibit 53), discussed above in connection with transition and the purpose clause, to support his opinion that the proposed development would be compatible with its surroundings. Tr. 238-241.

The opposition disagreed with Mr. Landfair's assessment. Jim Humphrey of the Montgomery County Civic Federation (MCCF) testified that placing a residential development on this site perpetuated the undesirable planning practice of interspersing more multi-family residential units with industrial uses, and thus the development would be incompatible with the surrounding area. Tr. 275. Citizen Robert Dyer opined that the project would not be compatible because it would intrude into parkland which is scarce in this area. Tr. 35-36.

Both Technical Staff and the Planning Board found the proposed development to be compatible with its surroundings. As stated by Technical Staff (Exhibit 30, pp. 16-17):

The proposed townhouse community is compatible with adjacent development in the surrounding area. Both townhomes and detached homes are by nature one-family residential dwellings, which in itself lends to a presumption of de facto compatibility. Furthermore, given the transitional nature of the surrounding area and the characteristics of the specific proposal, which provides comparable building heights and parkland buffers on three sides, any intrusiveness that could threaten the integrity of adjacent uses is minimized.

In addition, as demonstrated by Technical Staff's density comparison exhibit (Exhibit 53), "the density proposed for the subject property fits within a transitional framework for the area given the surrounding densities." Exhibit 30, p. 15.

Moreover, the binding elements in this case contribute to the compatibility of a rezoning. As stated in the Planning Board letter (Exhibit 38, p. 3):

. . . With the appropriate textual binding elements reflecting the compatibility of

the proposed development, the Board finds the proposal compatible with the surrounding area and considers the R-T 15 Zone suitable at this location.

The Hearing Examiner fundamentally agrees with the compatibility finding of Technical Staff and the Planning Board; however, the Hearing Examiner does not accept Mr. Landfair's suggestion that "townhouses are inherently compatible with other single family uses." Tr. 252. Compatibility depends on the height, bulk, density, proximity and buffering of the townhouses when compared to any nearby single-family uses. Nevertheless, the evidence in this case is that the proposed townhouse development will be compatible with other single-family uses in the surrounding area. The proposed townhouses will be no taller than 35 feet pursuant to Binding Element No. 3. There are no residences to the north, and the development will be surrounded by parkland on the south, east and west. There are other townhouses and multifamily developments to the west and northwest, and the single-family detached units to the east are buffered not only by parkland but by distance.

While there is a legitimate question, raised by MCCF, about locating a residential use next to an industrial zone, only one unit (Number 21) will be adjacent to the industrial zone to the north, and it will be separated by the access way to the Capital Crescent Trail and will undoubtedly be screened after review at site plan.

Based on this record, the Hearing Examiner finds that the proposed reclassification to the RT-15 Zone and the proposed development would be compatible with development in the surrounding area.

C. Public Interest

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated,

comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers Master Plan or Sector Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment, and factors such as provision of affordable housing, location near public transportation, and other public amenities.

The Sector Plan and the recommendations of the Planning Board and Technical Staff were considered, at length, in Part III.G., V.A. and V. B. of this report. The Sector Plan does not specifically recommend the RT-15 sought by Applicant, but the requested rezoning is consistent with most of its objectives (with the notable exception of preserving industrially zoned land), and more importantly, is consistent with its specific recommendation for a townhouse development on the site if access to Little Falls Parkway could be attained. The Planning Board and its Technical Staff support the proposed rezoning, believing that the development will be compatible with surrounding uses and compliant with the purposes and standards of the RT-15 Zone.

The impact on public facilities was discussed in Part. III. H. of this report. The evidence regarding school capacity indicates that, although the Bethesda-Chevy Chase cluster is currently over capacity, the Council has budgeted money in its Capital Improvements Program with the express intent of avoiding a residential development moratorium. Attachment to Council Resolution 17-141, Part II. The net effect is that overcrowding will be kept below 120% of capacity, and Applicant will have to pay a school facilities payment at all three levels.

The evidence also supports the conclusion that the impact on traffic and transportation facilities from this development would be minimal and will clearly meet LATR and PAMR standards. In addition, the proposed development would have no adverse effect on utilities or other public services.

The potential for any adverse environmental impact was discussed at length in Part III. I. of this report. As noted there, a forest conservation plan will be required at subdivision to provide for afforestation and to avoid damage to nearby off-site specimen trees, and removal of the brownfield will be supervised by the Maryland Department of the Environment. A stormwater management concept plan will be submitted to DPS, and it will be reviewed at subdivision. Concerns about the negative effect of losing some parkland to the access easement agreement are more than balanced by the many positive effects on the environment inherent in this project, including removal of a brownfield, significant reduction in imperviousness of the site, new stormwater management, improved water quality, reduction in truck traffic and noise, access to the Capital Crescent Trail, and a variety of public amenity projects. Neither Technical Staff nor the Planning Board noted any adverse effect on the environment.

In addition to the public amenities referenced above, the proposed development will provide five MPDUs in Bethesda, and a residential location with access to public transportation and the Capital Crescent Trail, which should reduce the use of vehicles.

Technical Staff concluded that the proposed development would be in the public interest, stating (Exhibit 30, p. 17):

The applicant proposes a townhouse development, including an affordable housing component, next to existing parkland. A connection to nearby parks is integrated into the townhouse community. Environmental improvements to the site will be provided in the form of updated stormwater management facilities and the removal of encroachments into adjacent parkland. The redevelopment of the site will eliminate an industrial brownfield and replace it with a residential development of appropriate density that fits within the character of the surrounding area and adds to the housing diversity of Bethesda. Additional housing at this location will also provide support for the many businesses near the site in the Westbard commercial area. For these reasons, the application bears a sufficient relationship to the public interest to justify its approval.

The Planning Board indicated that it “was persuaded by the reasoning in the Staff Report that the proposal meets the purpose clause of the R-T 15 Zone and that the proposal is in the public interest.”

Exhibit 38, p. 3.

The Hearing Examiner finds that this proposal will eliminate existing adverse impacts on the community, improve the environment, provide a transition from commercial and industrial development for the nearby single-family detached homes, add affordable housing in the area and establish a residential community with easy pedestrian and bicycle access to the Bethesda CBD and other points.

The Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effects on public facilities or the environment, and that approval of the requested zoning reclassification would be in the public interest.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. The application has satisfied the requirements of the RT-15 Zone and its Purpose Clause;
2. The application proposes a form of development that would be compatible with land uses in the surrounding area; and
3. The requested reclassification to the RT-15 Zone has been shown to be in the public interest.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-907, requesting reclassification of 1.8121 acres (78,935 square feet) of land, known as Parcel 513 on Tax Map HM 13, and located at 5400 Butler Road, Bethesda, Maryland, from the existing I-1 Zone to the RT-15 Zone, be **approved** in the amount requested and subject to the specifications and requirements of the revised Schematic Development Plan, Exhibit 69; provided that the Applicant submits to the Hearing Examiner for

certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance, and that the revised Declaration of Covenants (Exhibit 66(a)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance and proof thereof submitted to the Hearing Examiner within the same timeframe.¹⁸ The Council should also note that the Planning Board, at site plan review, may determine it is appropriate to reduce the setback requirements of Zoning Ordinance §59-C-1.732(a), as permitted by footnote one to that section, and to waive the row requirements of Zoning Ordinance §59-C-1.722, as permitted by §59-C-1.74(d)(2)).

Dated: September 8, 2011

Respectfully submitted,



Martin L. Grossman
Hearing Examiner

¹⁸ The Hearing Examiner believes that, pursuant to Zoning Ordinance §59-H-8.2(b), a five-member majority of the Council will be required to approve this application. Although the RT-15 classification is not specifically recommended by the Sector Plan, the Planning Board recommended approval. §59-H-8.2(b) provides:

(b)A resolution granting a classification that is not recommended for the subject property by an approved and adopted master or sector plan or functional master plan requires the affirmative vote of 6 members of the district council. However, if the Planning Board recommends approval of the classification, the resolution requires the affirmative vote of only 5 members.